(32,390)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 823

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY, PETITIONER,

vs.

HILBERT STUART ALLEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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[fol. 1] [Captions omitted]

IN CIRCUIT COURT OF CITY OF ST. LOUIS

62951-B

HILBERT STUART ALLEN

vs.

WALTER L. ROSS, Receiver of Toledo, Saint Louis and Western Railroad Company, a Corporation, and Toledo, Saint Louis and Western Railroad Company, a Corporation

[fol. 2] ORDER CONTINUING CAUSE—December 6, 1923

Separate amended answers to second amended petition filed by leave of Court. Reply to separate amended answers to second amended petition filed.

Now at this day this cause coming on for hearing come the parties hereto by their respective attorneys, comes also a jury, to-wit: "Milton Helscher, Oscar Korte, Frank Pentland, John Weeke, Walter Wishmeyer, Adolph W. Weber, Wm. Cox, Hy. J. Aufterheide, Augustine J. Barnidge, Wm. B. Stout, John L. Fenn and Oscar Schmidt," twelve good and lawful men, duly elected, tried and sworn, well and truly to try the issues herein joined, and a true verdict render according to the law and the evidence; thereupon the trial of this cause progressed, and not being terminated at the hour of adjournment the further hearing thereof is laid over until to-morrow morning at ten o'clock.

IN CIRCUIT COURT OF CITY OF ST. LOUIS

[Title omitted]

JUDGMENT—December 7, 1923

Now at this day come again the parties hereto by their respective attorneys, comes also again the jury heretofore sworn and impaneled herein; thereupon the further trial of

this cause progressed, and at the close of the whole case the Court gave to the jury a peremptory instruction to find a [fol. 3] verdict for defendant Walter L. Ross, Receiver of Toledo, Saint Louis and Western Railroad Company, a corporation, and this cause being terminated the jurors aforesaid, upon their oaths as aforesaid and under the instruction of the Court returned the following verdict: "We, the jury in the above cause, find in favor of the plaintiff and against the defendant Toledo, St. Louis & Western R. R. Co., on the issues herein joined and assess plaintiff's damages at the sum of Eighteen thousand Dollars, and we further find in favor of defendant Walter L. Ross, Receiver of Toledo, St. Louis & Western R. R. Co., W. E. Cox, Foreman."

Wherefore, it is considered and adjudged by the Court that the plaintiff take nothing by his suit in this behalf as to defendant Walter L. Ross, Receiver of Toledo, Saint Louis and Western Railroad Company, a corporation, that said defendant be discharged and go hence without day. It is further considered and adjudged by the Court that the plaintiff have and recover of the defendant Toledo, Saint Louis and Western Railroad Company, a corporation, the sum of Eighteen Thousand Dollars ($18,000.00) together with the costs of this suit, and have therefor execution.

Verdict and instructions filed.

IN CIRCUIT COURT OF CITY OF ST. LOUIS

[Title omitted]

ORDER ALLOWING APPEAL—January 21, 1924

Now at this day comes the defendant Toledo, Saint Louis and Western Railroad Company, a corporation, by attor- [fols. 4 & 5] neys, and upon its motion and for good cause shown the Court doth grant said defendant to and including the expiration of the February 1924 Term of this Court within which to file its bill of exceptions and until ten days after the close of the December 1923 Term of this court within which to give an appeal bond, conditioned accord-

ing to law, in the penal sum of $36,000.00, with surety to be approved by the Court, Judge or Clerk thereof in vacation; thereupon said defendant files and presents to the Court an affidavit for appeal and prays an appeal to the Supreme Court of Missouri, and the Court having seen and examined said affidavit doth order that an appeal be and is hereby allowed the defendant Toledo, Saint Louis and Western Railroad Company, a corporation to the Supreme Court of Missouri, from the judgment or decision of the court heretofore rendered herein.

Clerk's certificate to foregoing omitted in printing.

[fol. 6] IN SUPREME COURT OF MISSOURI, OCTOBER TERM, 1925

No. 25389

HILBERT STEWART ALLEN, Respondent,

vs.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, Appellant

STIPULATION TO CONTINUE—Filed December 2, 1925

It is hereby stipulated that this cause, now set for hearing on the 11th day of January, 1926, may be re-set during this term at the convenience of the Court; or, if impossible to be so re-set, then to be continued to the April Term, 1926.

H. R. Polak, Attorney for Respondent. Jones, Hocker, Sullivan & Angert, Attorneys for Appellant.

[fol. 7] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER CONTINUING CAUSE—December 22, 1925

Now at this day it is ordered by the Court, upon stipulation of the aforesaid parties, that this cause be and is continued to the April Term, 1926.

[fol. 8] IN SUPREME COURT OF MISSOURI, DIVISION NO. 2

[Title omitted]

Appeal from the Circuit Court of the City of St. Louis, Honorable Robert W. Hall, Judge

APPELLANT'S ABSTRACT OF RECORD—Filed March 25, 1926

CAPTION

The plaintiff commenced this action on January 29, 1923, by filing his petition in the Circuit Court of the City of St. Louis, Missouri, against Walter L. Ross, Receiver of the Toledo, St. Louis and Western Railroad Company.

[fol. 9] And thereafter, on May 15, 1923, plaintiff filed an amended petition, bringing in as a new party defendant the Toledo, St. Louis and Western Railroad Company.

SECOND AMENDED PETITION—Filed July 18, 1923

Now comes plaintiff by leave of Court and files this, his second amended petition.

Plaintiff states that he now is, and at all times herein mentioned was, a resident of the State of Illinois; that the defendant, Toledo, St. Louis and Western Railroad Company now is and at all times herein mentioned was a foreign corporation, authorized and licensed to do and doing business in the State of Missouri, engaged in the business of a common carrier of freight and passengers for hire between the different states of the United States, and at all of said times except as hereinafter stated, under the control, management and supervision of the defendant, Walter L. Ross, who was then and there the legally appointed, qualified and acting Receiver in charge of the management and operation of said Toledo, St. Louis and Western Railroad Company and of all properties in connection therewith and especially of certain tracks, rails, roadbeds, locomotives, cars and other [fol. 10] equipment then and there being operated at the time and place hereinafter complained of and more fully described, as a common carrier of freight and passengers for hire between the different states of the United States.

Plaintiff states that on the 29th day of December, 1922, the District Court of the United States for the Northern District of Ohio, Western Division (under and by whom said defendant Walter L. Ross was appointed, qualified and acting as Receiver in charge of the property of the defendant, Toledo, St. Louis and Western Railroad Company, as aforesaid, at the times herein complained of), by a decree duly entered of record, directed the said Receiver, Walter L. Ross (on- of the defendants herein), to return the property and equipment of the defendant, Toledo, St. Louis and Western Railroad Company, to said railroad; said decree, among other things, providing as follows:

"(a) Said property shall remain subject to all lawful liens thereon at the time of the delivery thereof by the Receiver to the defendant Railroad Company and shall be subject to such liens as are placed thereon by the terms of this order and decree and by the terms of orders and decrees hereafter made by this Court.

"(b) The defendant Railroad Company shall perform and discharge all lawful obligations and liabilities of the Receiver of every kind and character whatsoever incurred in the management and operation of said railroad and property by said Receiver; shall perform and discharge, on behalf of the Receiver, all contracts made by him and subsisting and unperformed at midnight on December 31, 1922; [fol. 11] and shall defend and save said Receiver harmless from any and all claims, demands, debts, actions and causes of action of every kind and character whatsoever, heretofore or hereafter made or asserted against him, and from any and all costs and expenses incident thereto or resulting therefrom; provided, however, that the defendant Railroad Company shall have the right to appear and oppose, contest and defend any and all claims, debts, demands, actions and causes of action against said Receiver which it shall consider to be unlawful, improper or excessive.

"(c) The defendant Railroad Company shall pay all the expenses, disbursements and allowances heretofore or hereafter ordered in this cause to be paid and in the installments and at the times and in the manner so ordered to be paid; and the liens under such orders for the payment of

such expenses, disbursements and allowances shall remain fixed upon said railroad and properties delivered by the Receiver to the Railroad Company hereunder.

"(d) The defendant Railroad Company shall, on behalf of said Receiver, take over and assume the prosecution or defense, as the case may be, of all actions and suits at law or in equity by or against him, or in which he is a party, by intervention or otherwise, pending and undetermined at midnight on December 31, 1922, or which shall thereafter be commenced in any court or tribunal; and the property and assets of the defendant Railroad Company shall be subject to the liens of any and all orders, judgments and decrees against said Receiver, and shall be subject to seizure and sale for the satisfaction thereof, as this Court shall from time to time order and direct; provided that the [fol. 12] Receiver shall and he hereby is directed to proceed with the prosecution of the ancillary suit entitled, 'Walter L. Ross, Receiver, v. The Toledo Terminal Railroad Company,' pending in the District Court of the United States for the Northern District of Ohio, Western Division, and all proceedings growing out of such suit; and the said defendant Railroad Company shall assume and pay the costs and expenses of said Receiver incurred in connection therewith and shall indemnify and save him harmless from all costs, expenses and liabilities in connection therewith or arising therefrom."

Plaintiff states that subsequent to the rendering and entering of record of said decree, as above, the defendant, Walter L. Ross, Receiver, in compliance with the terms of said decree, returned the property to the defendant Toledo, St. Louis and Western Railroad Company and the last-named defendant accepted and re-entered into the possession of the said property under and by virtue of said decree.

And plaintiff states that the defendant, Toledo, St. Louis and Western Railroad Company, by accepting and re-entering into the possession of its property under the above-mentioned decree, agreed to and did assume the defense of all actions then pending and thereafter to be brought against the defendant, Walter L. Ross, Receiver, and all lawful obligations and liabilities incurred by said Receiver while operating said railroad, and agreed to pay out of said prop-

erty all judgments that should be obtained in such actions; and plaintiff further states that the defendant, Walter L. Ross, Receiver, earned for said railroad, while operating same, an amount greatly in excess of the amount herein [fol. 13] sued for, the exact amount of which the plaintiff is unable to state, and out of the net earnings of the said railway system during the period of the receivership applied to the permanent improvement and betterment of the Railway Company's property a large sum (the exact amount of which plaintiff is unable to state), said amount being far in excess of the amount sued for by plaintiff; and plaintiff states that by reason of the aforesaid facts, said property was returned to the defendant Toledo, St. Louis and Western Railroad Company greatly enhanced in value.

And plaintiff states that by reason of the facts and matters hereinabove set out, the Toledo, St. Louis and Western Railroad Company is a necessary party to a full, complete and proper determination of the matters herein complained of.

Plaintiff states that at the time plaintiff received the injuries herein complained of the said defendant, Toledo, St. Louis and Western Railroad Company, under the control, management and supervision of the defendant, Walter L. Ross, as Receiver thereof, as above stated, was engaged as a common carrier of freight and passengers for hire, between the states of the United States; that plaintiff herein suffered the injuries herein complained of while he was employed and engaged by such carrier and such Receiver in charge thereof in such interstate commerce, plaintiff's injuries herein complained of resulting in whole or in part from the negligence of the officers, agents and employes of such carrier and such Receiver thereof, and by reason of defects and insufficiencies due to such carrier's and such [fol. 14] Receiver's negligence in their cars, engines, appliances, machinery, tracks, roadbed, works and other equipment, while said Receiver was in charge of such carrier, as hereinabove stated.

Plaintiff further states that the within action at law arose under and is based on Section 8657 of the United States Compiled Statutes 1918, entitled, "An Act Relating to the Liability of Common Carriers by Railroads En-

gaged in Interstate or Foreign Commerce, for Injuries to Employes from Negligence," approved April 22, 1908; and that said action was brought within the period of limitations now prescribed by state and federal statutes; and was brought within two years from the time said cause of action accrued.

Plaintiff, for his cause of action, states that at about 1:30 o'clock a. m. on the 27th day of October, 1922, while he was employed as above stated, in a place assigned him by the defendant, Walter L. Ross, Receiver of the Toledo, St. Louis and Western Railroad Company, and the defendant Toledo, St. Louis and Western Railroad Company, to wit, in and about and near said defendants' railroad tracks in and near the City or Town of Madison, in the State of Illinois, and particularly certain tracks of said defendants known and designated as switching tracks numbers four and five and while plaintiff was standing between said tracks engaged in checking certain of said defendants' cars in one of their trains standing on said track number five and exercising due care and caution for his own safety, the said defendants carelessly and negligently caused certain of their cars then and there being moved and switched by [fol. 15] one of their locomotives, in the process of making up the aforesaid train, to be moved westwardly on their said track number four, causing plaintiff to be suddenly and violently struck with great force by said moving cars and thrown to the roadbed, rails and ties of said tracks and dragged along and upon the surface thereof and run over by the wheels and trucks of said cars, and injured as hereinafter more fully described.

And plaintiff states that said defendants, their officers, agents and employes failed to furnish him a safe place in which to perform the duties assigned him.

And plaintiff further states that the said defendants, their officers, agents and employes, in charge of said locomotives and moving cars, saw or by the exercise of ordinary care could have seen, plaintiff between said tracks, and in a position of peril and oblivious thereof in time thereafter, by the exercise of ordinary care, with the means and appliances at hand, to have either held said cars stationary, or after having started said cars, stopped them, or slackened the speed thereof in time, by the exercise of ordinary care, to

have avoided striking and injuring plaintiff; but that said defendants, their officers, agents and employes failed and neglected so to do.

That the defendants failed to maintain a proper, adequate and safe width between the two tracks referred to, in that the width was so small that the space between cars on said tracks was only about two feet, so that persons working in such space, and particularly this plaintiff, when [fol. 16] one of said tracks was occupied by cars, would be liable to be struck and injured by cars being moved on the other of said tracks, all of which facts were well known to defendants, or by the exercise of ordinary care could have been so known.

And plaintiff states that his duties required him to make a record of the cars on said track number 5 and their contents and destination, and that in order to do so, it was necessary for him to go from car to car continually facing said cars and with his back to said track number 4 and oblivious to the fact that cars were being moved or about to be moved on said track number 4; that the said defendants required him to perform this work very rapidly and faster than was consistent with his safety; and that by reason thereof he was required to and did continually face the said cars on said track number 5, intent on his said duties, and was not given an opportunity to look about him to assure himself that cars were not being moved on said track number 4; all of which facts plaintiff states the defendants well knew, or by the exercise of ordinary care could have known; and plaintiff states that by reason thereof, it thereupon became the duty of said defendants to have warned him by bell, whistle, or other signal before moving said cars on said track number 4, or to have provided and maintained a lookout man on said moving cars, and required said lookout man to have either warned plaintiff in time for him to have avoided being struck and injured by said cars, or applied the brakes and stopped said cars or slackened the speed thereof in time to have avoided striking and injuring him; but plaintiff states that said defendants, their of- [fol. 17] ficers, agents and servants negligently and carelessly failed to do or perform any of the aforesaid things.

And plaintiff states that said defendants, their officers, agents and servants, at the time complained of, caused said moving cars on said track number 4 to be first propelled and

started by a locomotive and then to be suddenly uncoupled from same, at a great distance from where plaintiff was at work at the time and place complained of, to wit, a distance of about one hundred and sixty yards, and said cars thence and thereafter to roll or coast toward plaintiff, under their own momentum, and without steam or other power; and that by reason thereof, said cars were caused to and did move silently and noiselessly toward plaintiff and the place where he was engaged in his duties as aforesaid, and in a position of peril and obivious to the movement of said cars and the danger of same; all of which facts plaintiff states the said defendants well knew, or by the exercise of ordinary care could have so known; and plaintiff states that by reason of the foregoing facts, it became the duty of said defendants, their officers, agents and servants to have warned him by bell, whistle, or other signal that said cars were being moved, as aforesaid, or cause a lookout man to be on said moving cars, and required said lookout man to have either warned plaintiff in time for him to have avoided being struck and injured by said cars, or applied the brakes and stopped said cars or slackened the speed thereof in time to have avoided striking and injuring him; but plaintiff states that said defendants, their officers, agents and servants carelessly and negligently failed to do or perform any of the aforesaid things.

[fol. 18] And plaintiff states that said defendants, their officers, agents and servants carelessly and negligently failed and omitted to make, provide, promulgate and enforce safe and proper rules and regulations for the protection of persons working in and about the switching yards and tracks complained of; and carelessly and negligently failed and omitted to make and provide a code of signals by light, bell, whistle or other device, for warning persons working in and about the switching yards and tracks complained of, including this plaintiff.

And plaintiff states that at the time complained of, his duties required him to perform his work with his face toward the cars standing on said track number 5, and with his back toward said track number 4, the track on which said cars were caused to be moved by said defendants, as aforesaid; all of which facts were well known to said defendants, or by the exercise of ordinary care could have been so known; and that it thereupon became the duty of

said defendants either to warn plaintiff by bell, whistle or other signal; or to maintain a lookout man on said moving cars so that such lookout man could have warned plaintiff, or applied the brakes on said cars and stopped said cars or slackened the speed thereof in time, by the exercise of ordinary care, to have prevented said cars from striking and injuring plaintiff. And plaintiff states that the said defendants failed either to warn him by bell, whistle or other signal, or maintain a lookout man on said moving cars for the purpose of warning him or applying the brakes and stopping or slackening the speed of said moving cars in time to have prevented striking and injuring him as afore-[fol 19] said; and plaintiff states that he had no means of knowing and did not know that the cars in question were about to be moved or were being moved on said track number 4 at the time complained of.

And plaintiff states that at the time complained of and for a space of about a half hour prior thereto, he was engaged in the performance of his duties in the space between said tracks referred to, with a lighted lantern in his hands, and that said defendants, their officers, agents and employes saw said lantern and knew of the small space between said tracks, and the small space between cars on said tracks, and of plaintiff's presence there, and in a position of peril and oblivious thereof, or by the exercise of ordinary care could have seen and known all of these facts; and that by reason thereof it thereupon became their duty to have either warned plaintiff before moving said cars as aforesaid, or moved them slowly or caused said cars to remain stationary until plaintiff was in a position of safety or maintained a lookout man on said cars for the purpose of warning plaintiff, or applying the brakes on said cars so as to avoid striking and injuring him, as aforesaid; but plaintiff states that said defendants, their officers, agents and employes carelessly and negligently failed so to do; and that he had no means of knowing and did not know that the cars in question were about to be moved or were being moved on said track number 4 at the time complained of.

And plaintiff states that as a direct result of each and all of the foregoing negligent and careless acts and omissions by said defendants, their officers, agents and em-[fol. 20] ployes, and the aforesaid defects and insufficiencies due to such defendants' negligence in their cars, engines,

appliances, machinery, tracks, roadbed and other equipment, the aforesaid moving cars were caused to and did suddenly and violently strike and throw plaintiff to the roadbed, rails and ties of said tracks and drag him along and upon the surface thereof and the wheels and trucks of said cars were caused to run over and injure him as follows:

That his right leg, and the bones, ligaments, muscles, tendons, nerves, tissues, arteries and blood vessels thereof, and especially from a point about two inches below the knee to the sole of his foot, were broken, fractured, crushed, lacerated, ruptured and torn; so that it became necessary to and his said right leg was thereafter amputated at a point about five inches below the knee.

That his right leg, at a point about three inches below the hip joint, and the bones, ligaments, muscles, nerves, tendons, tissues, arteries and blood vessels in said region were broken, fractured, wrenched, twisted, lacerated, ruptured and torn.

That the remaining portion of said right leg has become permanently shortened about four inches, and shrunken, atrophied and useless; that the right side of the pelvis was broken and fractured and the top of the femur impacted about two inches into the right side of the pelvis.

That both shoulders, and the bones, ligaments, muscles, nerves and tissues thereof were wrenched, twisted, dislocated, sprained, ruptured and torn.

That his body in the region of the chest, and the ligaments, muscles, nerves, tissues and arteries in said region [fol. 21] were wrenched, lacerated, ruptured, sprained and torn; and the pleura in said region and both lungs were wrenched, twisted, ruptured and torn.

That the third, fourth, fifth and sixth ribs on the left side were broken and fractured at a point about one inch from the sternum and torn loose from said sternum; and the ligaments, muscles, nerves, tendons, tissues, arteries and blood vessels in said region where wrenched, twisted, lacerated, ruptured and torn.

That his left arm at a point about halfway between the shoulder and elbow and the bones, ligaments, muscles, nerves, tendons, tissues and blood vessels in said region were broken, fractured, wrenched, twisted, ruptured and torn.

That he sustained a fracture of the base of the skull at the juncture of the skull and the spinal column.

That his head at a point just over the left eye and the flesh, nerves and tissues in said region were lacerated, cut and bruised; that his left ear, both the outer part and inner structural part, and the tissues, nerves, arteries and blood vessels in said region were wrenched, twisted, ruptured and torn; and the hearing of said ear impaired about fifty per cent.

That he sustained a severe and permanent shock to his nerves and nervous system.

Plaintiff states that all of the aforesaid injuries are permanent.

Plaintiff states that as a result of the aforesaid injuries he was caused to suffer, is now suffering and will in the future suffer intense physical pain, mental anguish, head-[fol. 22] aches, sleeplessness and loss of appetite; that he has become permanently crippled and disfigured, and permanently disabled from performing his usual work as a train checker, at the rate of one hundred and thirty-six dollars per month, or any work, from the date of the injuries complained of until the date of the filing of this second amended petition, or a total of eight and a half months, with a consequent loss of earnings in an aggregate sum of eleven hundred and fifty-six dollars; and that he is disabled from ever performing any kind of labor in the future, to his loss in an amount which it is impossible to state.

That as a result of said injuries he was compelled to incur and obligate himself for hospital attendance and board at the rate of twenty-five dollars per week, for a period of eleven weeks, or a total of two hundred and seventy-five dollars; that he has incurred and obligated himself for surgical services in the sum of five hundred dollars; and in the future he will be compelled to incur and obligate himself for surgical services, X-Ray photographs and medicines and surgicial appliances in a large sum, the exact amount of which it is impossible to state.

Wherefore, the premises considered, plaintiff states he has been injured and damaged in the sum of one hundred thousand dollars ($100,000.00) for which amount together with his costs he prays judgment against the defendant.

H. R. Polak, Counsel for Plaintiff.

[fol. 23] Demurrer of Defendant Toledo, St. Louis and Western Railroad Company to Plaintiff's Second Amended Petition—Filed July 18, 1923

Now comes the defendant Toledo, St. Louis and Western Railroad Company, by leave of Court, and demurs to plaintiff's second amended petition herein, and for grounds of said demurrer states:

1. That there is a misjoinder of parties defendant to said second amended petition, for the reason that this defendant is improperly joined in an action against Walter L. Ross, Receiver of the St. Louis, Toledo and Western Railroad Company.

2. Said second amended petition does not state facts sufficient to constitute a cause of action against this defendant.

Jones, Hocker, Sullivan & Angert, Attorneys for Defendant Toledo, St. Louis and Western Railroad Company.

Order Overruling Demurrer

And thereafter, on August 16, 1923, during the June Term, 1923, of said Circuit Court, the defendant's said demurrer was by the Court overruled.

And thereafter, on August 25, 1923, the defendants filed their separate answers to said second amended petition.

[fol. 24] Separate Amended Answer of Defendant Toledo, St. Louis and Western Railroad Company—Filed December 6, 1923

Now comes the defendant Toledo, St. Louis and Western Railroad Company, by leave of Court first had and obtained, and for its separate answer to the plaintiff's second amended petition herein admits that on or about the 27th day of October, 1922, the plaintiff was in the employ of the defendant Receiver herein, but this defendant denies each

and every other allegation in said second amended petition contained.

And for further answer herein this defendant states that at and prior to the time of the alleged injuries to the plaintiff, the plaintiff was in the employ of the defendant Receiver herein as a train checker; that in the performance of his duties as such it was necessary for the plaintiff to go upon and about the tracks of said Receiver at Madison, Illinois; that by accepting such employment the plaintiff thereupon assumed all the risks incident to the discharge of his duties as train checker; that the distance or space between tracks Nos. 4 and 5 was known and was plainly visible and obvious to plaintiff; that the plaintiff knew that said track No. 4 was a switching track over which defendant was constantly switching trains and cars, and [fol. 25] that the injuries received by the plaintiff, if any, were due to the ordinary risks assumed by plaintiff incident to and in the course of his said employment.

And for another and further defense herein, this defendant alleges that whatever injuries, if any, were sustained by the plaintiff at the time alleged in the petition were due in whole or in part to the plaintiff's own negligence and carelessness directly contributing thereto in standing upon and in too close proximity to said track No. 4 over which he knew, or by the exercise of ordinary care should have known, that the defendant Receiver would switch cars, and in failing to observe, or to exercise ordinary care to observe, and to keep a lookout for, the switching of cars over and upon said track No. 4.

Wherefore, having fully answered, this defendant prays to be dismissed with its costs.

Jones, Hocker, Sullivan & Angert, Attorneys for Defendant Toledo, St. Louis and Western Railroad Company.

REPLY—Filed December 6, 1923

Comes now plaintiff, by leave of Court, and as of December 6, 1923, files this, his reply to amended answer of the defendant Toledo, St. Louis and Western Railroad Company to plaintiff's second amended petition, and denies each and

every allegation in said amended answer contained, and [fol. 26] prays for judgment, as in his petition.

H. R. Polak, Attorney for Plaintiff.

MINUTE ENTRIES

Trial, Submission and Judgment

And thereafter, on said 6th and 7th days of December, 1923, during the December Term, 1923, of said Circuit Court, said cause was duly tried before the Hon. Robert W. Hall, Judge of said court, and a jury, in Division No. 6 of said Circuit Court, at the conclusion of which trial a verdict was rendered for the plaintiff in the sum of $18,000.00, on which judgment was entered.

Motion for New Trial Filed

And thereafter, during the same term of said court, and within four days after verdict, and on December 10, 1923, the defendant Toledo, St. Louis and Western Railroad Company filed its motion for a new trial.

Motion for New Trial Overruled

And thereafter, on January 14, 1924, during the January Term, 1924, of said court, the defendant's said motion for a new trial was by the Court overruled.

Appeal Granted

And thereafter, during said January Term, 1924, of said court, the defendant Toledo, St. Louis and Western Railroad Company filed its affidavit for appeal in said cause and said defendant was duly granted an appeal to the Supreme Court.

[fol. 27] BILL OF EXCEPTIONS FILED

And thereafter, within the time allowed by law, the defendant duly filed its bill of exceptions in said cause, and the same was duly signed, sealed, allowed and made a part of the record in said cause.

Bill of Exceptions

Caption

Be It Remembered, That on the 6th day of December, A. D. 1923, the above-entitled cause came on for a hearing before the Honorable Robert W. Hall, Judge, and a jury, in Division No. 6 of the Circuit Court of the City of St. Louis and State of Missouri, at which time the following proceedings were had, to wit:

Appearances of Counsel

H. R. Polak, Esq., appeared on behalf of the plaintiff.

Messrs. Jones, Hocker, Sullivan & Angert (Mr. Hocker) appeared on behalf of the defendant.

Plaintiff's Evidence in Chief

Offers in Evidence

The plaintiff, to support the issues on his behalf, offered and introduced the following evidence:

Mr. Hocker: In order to shorten this record I will make the admission that the defendant, Walter L. Ross, was ap- [fol. 28] pointed Receiver of the Toledo, St. Louis and Western Railroad Company under an order dated October 23rd, 1914, with the usual powers of receivers, unless there is something more particular that you want in here.

Mr. Polak: Well, that is all, that he was appointed Receiver in 1914 by the District Court of the Northern District of Ohio, and had charge of and control under that decree of the property of the Toledo, St. Louis and Western Railroad Company, and was acting as such Receiver at the time charged in the petition, that is, the 27th day of October, 1922.

Mr. Hocker: Very good.

Mr. Polak: I offer in evidence Plaintiff's Exhibit A, which is a decree of the District Court of the United States for the Northern District of Ohio, Western Divi-

sion, ordering the Receiver discharged from the custody and control of the property of the Toledo, St. Louis and Western Railroad Company. I understand, your Honor, that everything in there is in and without bothering to read it now—if Mr. Hocker wants to read any part of it later he can—or if I want to, if it is necessary the whole thing is considered in evidence.

Said Plaintiff's Exhibit A is in words and figures as follows:

[fol. 29] PLAINTIFF'S EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

No. 21. In Equity

HORATIO C. CREITH, Plaintiff,

vs.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, Defendant

Order

This cause came on to be heard this day upon the ancillary bill of complaint, and upon the answer of the defendant thereto this day filed herein, for the appointment of a receiver, as prayed for in said ancillary bill, and it appearing that the District Court of the United States for the Northern District of Ohio, Western Division, has heretofore taken jurisdiction and appointed Walter L. Ross Receiver herein, and the parties hereto having been represented by counsel, upon consideration thereof;

It was ordered, adjudged and decreed that this Court assume jurisdiction in this cause in aid of the receivership within the jurisdiction of the District Court of the United States for the Northern District of Ohio, Western Division, as evidenced by the decretal order of said Court appointing said Receiver, made and entered by said Court on the 22nd day of October, 1914, and reference to which is hereby made;

That Walter L. Ross be, and he is hereby appointed Re-
[fol. 30] ceiver of the said Toledo, St. Louis and Western Railroad Company and of all of the railroads and other property and assets of the defendant, including all tracks, terminal facilities, warehouses, offices, stations, shops and all buildings and appurtenances of every kind, locomotives, cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, coal, materials, supplies, books of account, records and other books, papers and accounts, cash in banks, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, securities (other than such as are pledged with and held by third parties as collateral security for the indebtedness of defendant), deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue, as well as all leasehold interests and operating and other contracts, rights, interest, easements, profits, real estate, rights of way, franchises and other assets and property owned, possessed and used by it in the operation of its said railroad, mentioned and described in the ancillary bill of complaint herein, with all the powers and subject to all the duties mentioned and described in said decretal order of the said District Court of the United States for the Northern District of Ohio, Western Division, except as follows:

First. That the Receiver, as speedily as possible after taking possession of said property, cause to be made and filed with this Court a general inventory of the railroad property and assets of which he is appointed Receiver.

Second. That except for the purpose of securing tem-
porary loans for working capital in the ordinary opera-
[fol. 31] tion of the road, such as the payment of railroad and traffic balances and the life, the Receiver shall not have power to borrow money except upon the order of this Court after application duly made for that purpose.

Third. That before the payment of any future install-
ment of interest upon the prior lien and first gold bonds described in the bill, the Receiver shall make to this Court, in due season, a report showing the result of his operations and the condition of the property and shall obtain the order of this Court anthorizing such payments.

It is further ordered that said Receiver give bond in the sum of twenty-five thousand dollars ($25,000) conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property that may come into his hands, and abide by and perform all things which he shall be directed to do, said bond to be with sufficient surety, to be approved by the Judge of this court, and to be forthwith filed in the office of the clerk of this caurt.

That said Receiver forthwith take possession of all of said property and assets of said defendant.

It is further ordered that each and every of the officers, directors, agents and employes of said defendant, and all other persons be, and they are hereby required and commanded forthwith upon demand of said Receiver, or his duly authorized agent, to turn over and deliver to said Receiver, or his duly constituted representative, any, and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property (other than such as are pledged with and held by third [fol. 32] parties as collateral security for the indebtedness of defendant) in his or their hands, or under his or their control, and each of said officers, directors, agents and employes is hereby commanded and required to obey and conform to such orders as may be given them from time to time by said Receiver, or his duly constituted representatives, in conducting the operation of said property and in discharging his duties as Receiver.

It is further ordered that said defendant and its officers, directors, agents and employes, and all other persons claiming to act by, through or under said defendant, and all other persons whosoever are hereby enjoined and restrained from interfering in any way whatever with the possession or management of any part of the property over which said Receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties or his operating the same.

Dated October 23rd, 1924.

Enter.

Humphrey, District Judge.

Indorsed: Filed Oct. 23, 1914. R. C. Brown, Clerk.

UNITED STATES OF AMERICA,
Southern District of Illinois,
Southern Division, ss:

I, S. T. Burnett, Clerk of the District Court of the United States for the Southern District of Illinois and keeper of the records and seals thereof, do hereby certify that the foregoing is a true and complete copy of an order made and entered by said Court on the 23rd day of October, A. D. [fol. 33] 1914, in the cause entitled, Horatio C. Creith v. Toledo, St. Louis and Western Railroad Company, No. 21, in Equity, as fully as the same appears from the records of said court in said cause in my office remaining.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at Springfield, in said district, this 5th day of December, A. D. 1923.

S. T. Burnett, Clerk. (Seal.)

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, Louis Fitz Henry, Judge of the District Court of the United States, for the Southern District of Illinois, do hereby certify that the foregoing attestation, signed by S. T. Burnett, clerk of said court, is in due form.

In Testimony Whereof, I have hereunto set my hand at the City of Springfield in said district this 5th day of December in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-eight.

Louis Fitz Henry, District Judge.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, S. T. Burnett, Clerk of the District Court of the United States for the Southern District of Illinois, do hereby certify that the Honorable Louis Fitz Henry, whose name appears subscribed to the foregoing certificate, is, and was [fol. 34] at the date thereof, sole Judge of said District Court, and that his signature to said certificate is in his genuine handwriting.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at Springfield in said district this 5th day of December, in the year of our Lord one thou-

sand nine hundred and twenty-three, and of the Independence of the United States the one hundred and forty-eighth.

S. T. Burnett, Clerk. (Seal.)

In the District Court of the United States for the Northern District of Ohio, Western Division

In Equity. No. 112

Horatio C. Creith, Plaintiff,

vs.

Toledo, St. Louis and Western Railroad Company, Defendant

Order and Decree Discharging Receiver from Custody and Control of Property

This cause came on to be further heard at this term, *open* the application of Toledo, St. Louis and Western Railroad Company, defendant herein, for the return to it of property in the possession of Walter L. Ross, Receiver, and was argued by counsel; and thereupon, upon consideration thereof, and there being no objection thereto, it was ordered, adjudged and decreed as follows, viz.:

1. Walter L. Ross, Receiver, is hereby authorized and directed, at midnight, on Sunday December 31, 1922, to deliver possession to Toledo, St. Louis and Western Railroad [fol. 35] Company of, and to transfer all his right, title and interest as such Receiver in the railroad and other property and assets now operated or held by him, as such Receiver, including all tracks, terminal facilities, warehouses, offices, stations, shops and all buildings and appurtenances of every kind, locomotives, cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, coal, materials, supplies, books of account, records and other books, papers and accounts, cash in banks, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue, as well as all leasehold interests and operating and other con-

tracts, rights, interests, easements, profits, real estate, rights of way, franchises and other assets and property owned, possessed and used by him, as such Receiver, in the operation of said railroad, excepting therefrom all claims, debts, demands, actions and causes of action which exist or may arise by reason of, or out of, the control and operation of said railroad by the Government of the United States, or by reason of the guaranty contained in, or any other provisions of, the Transportation Act of 1920, or Section 15a of the Act to Regulate Commerce, as amended February 28, 1920, or the orders or regulations of any Board or Commission constituted and acting under either of said acts, in so far as such claims, debts, demands, actions or causes of action, orders or regulations relate to or concern the operation of said railroad by said Receiver, or relate to or concern the said railroad or other property during the pendency [fol. 36] of this cause; and excepting, further, all claims, debts, demands, actions or causes of action which are the subject matter of intervening or ancillary petitions filed in the District Court of the United States for the Northern District of Ohio, Western Division, or in the District Court of the United States for the Southern District of Illinois, Southern Division; but subject, however, to the following terms, conditions and reservations upon which said Toledo, St. Louis and Western Railroad Company shall receive, hold and use the said property and each and every part thereof, to wit:

(a) Said property shall remain subject to all lawful liens thereon at the time of the delivery thereof by the Receiver to the defendant Railroad Company and shall be subject to such liens as are placed thereon by the terms of this order and decree and by the terms of orders and decrees hereafter made by this Court.

(b) The defendant Railroad Company shall perform and discharge all lawful obligations and liabilities of the Receiver of every kind and character whatsoever incurred in the management and operation of said railroad and property by said Receiver; shall perform and discharge, on behalf of the Receiver, all contracts made by him and subsisting and unperformed at midnight on December 31, 1922; and shall defend and save said Receiver harmless from any

and all claims, demands, debts, actions and causes of action of every kind and character whatsoever, heretofore or hereafter made or asserted against him, and from any and all costs and expenses incident thereto or resulting therefrom; provided, however, that the defendant Railroad [fol. 37] Company shall have the right to appear and oppose, contest and defend any and all claims, debts, demands, actions and causes of action against said Receiver which it shall consider to be unlawfull, improper or excessive.

(c) The defendant Railroad Company shall pay all the expenses, disbursements and allowances heretofore or hereafter ordered in this cause to be paid and in the installments and at the times and in the manner so ordered to be paid; and the liens under such orders for the payment of such expenses, disbursements and allowances shall remain fixed upon said railroad and properties delivered by the Receiver to the Railroad Company hereunder.

(d) The defendant Railroad Company shall, on behalf of said Receiver, take over and assume the prosecution or defense, as the case may be, of all actions and suits at law or in equity by or against him, or in which he is a party, by intervention or otherwise, pending and undetermined at midnight on December 31, 1922, or which shall thereafter be commenced in any court or tribunal; and the property and assets of the defendant Railroad Company shall be subject to the liens of any and all orders, judgments and decrees against said Receiver, and shall be subject to seizure and sale for the satisfaction thereof, as this Court shall from time to time order and direct; provided that the Receiver shall — and he hereby is directed to proceed with the prosecution of the ancillary suit entitled "Walter L. Ross, Receiver, v. The Toledo Terminal Railroad Company," pending in the District Court of the United States for the Northern District of Ohio, Western Division, and all proceedings growing out of such suit; and the said defendant Railroad [fol. 38] Company shall assume and pay the costs and expenses of said Receiver incurred in connection therewith and shall indemnify and save him harmless from all costs, expenses and liabilities in connection therewith or arising therefrom.

(e) The Court reserves jurisdiction to again take possession of the railroad and properties, directed as aforesaid to be delivered to the defendant Railroad Company, for the purpose of enforcing any term, provision or condition of this order and decree, and for the enforcement of all lawful liens placed thereon by order or orders of this Court, and for preserving and maintaining full jurisdiction in respect of the matters and things excepted from delivery and transfer, as aforesaid, and its jurisdiction to change or supplement the terms and provisions of this order and decree as the Court shall determine to be necessary or proper.

(f) The Court retains full jurisdiction of said intervening and ancillary petitions and of the claims, debts, demands, actions and causes of action which are the subject matter thereof and of the matters which shall pertain thereto or shall grow out of them.

2. The said Receiver shall execute and deliver to said defendant Railroad Company, for the purpose of carrying out the terms and provisions of this order and decree, an instrument reading as follows:

Toledo, Ohio, December —, 1922.

In pursuance of an order and decree entered by the District Court of the United States for the Northern District of Ohio, Western Division, on the — day of ——, 1922, and of an order and decree entered on the — day of December, 1922, by the District Court for the Southern District of Illi-
[fol. 39] nois, Southern Division, each such order and decree having been entered in the cause entitled "Horatio C. Creith, plaintiff, v. Toledo, St. Louis & Western Railroad Company, defendant," I, Walter L. Ross, Receiver of property of the Toledo, St. Louis & Western Railroad Company, do hereby deliver and transfer to said Toledo, St. Louis & Western Railroad Company, its successors and assigns, the railroad and other property, and all my right, title and interest therein, as such Receiver, directed by said Court to be delivered and transferred by me to said company; but subject, nevertheless, to the terms, conditions and provisions of said orders and decrees.

Upon request, I will execute and deliver all formal instruments of conveyance which may be necessary or proper

in the premises to make effective the delivery and transfer ordered to be made, as aforesaid.

This instrument shall be effective at midnight, Sunday, December 31, 1922.

—— ——, Receiver of Toledo, St. Louis & Western Railroad Company.

In presence of —— ——.

STATE OF OHIO,
Lucas County, ss:

Be It Remembered, That on this — day of December, 1922, before me, a Notary Public in and for the County and State aforesaid, appeared Walter L. Ross, Receiver of Toledo, St. Louis & Western Railroad Company, who acknowledged the signing of the foregoing instrument and that the execution thereof was his voluntary act and deed for the purposes therein mentioned.

[fol. 40] In Witness Whereof, I have hereunto set my hand and affixed my notarial seal at Toledo, Ohio, on the — day of December, 1922.

—— ——, Notary Public in and for said County and State. My commission expires —— —, ——.

Cleveland, Ohio, December —, 1922.

Toledo, St. Louis & Western Railroad Company, by officers thereunto duly authorized, hereby accepts possession and transfer of the property described in the foregoing instrument subject to the terms, provisions and reservations contained in the orders and decrees therein mentioned.

Toledo, St. Louis & Western Railroad Company, by —— ——, Chairman of the Board. (Corporate Seal.)

Attest: —— ——, Secretary.

3. The Receiver is directed, on or before April 1, 1923, to prepare and file an account herein to December 31, 1922, unless the time therefor shall be extended for good cause shown.

4. All matters and questions not hereby disposed of are hereby reserved for future adjudication, and any person,

a party to these proceedings or affected thereby, may, at any time, apply to the Court for further relief in the premises.

5. The decrees and orders of this Court enjoining and restraining all persons whomsoever, from interfering, in any way whatsoever, with the possession and management of property of said defendant Railroad Company in the possession of said Receiver, and from instituting or prosecut-
[fol. 41] ing any actions, suits or proceedings against said defendant Railroad Company, without order and permission of this Court, are hereby vacated in so far as they relate to the railroad and other property returned to the Railroad Company in pursuance of this order and in so far as they enjoin the institution or prosecution of actions, suits or proceedings against the defendant Railroad Company.

6. The Court reserves the right to make such changes in and additions to this order as it shall determine to be necessary or proper, and the hearing on said application of said defendant Railroad Company is hereby continued to such day or days as the Court shall order.

7. The property, matters and things excepted as aforesaid from delivery and transfer to said defendant Railroad Company shall be held, used and disposed of by the Receiver as the Court may from time to time direct.

(Signed) John M. Killits, District Judge.

Entered December 29, 1922.

UNITED STATES OF AMERICA,
Northern District of Ohio,
Western Division:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Order and Decree Discharging Receiver from custody and control of the property entered upon the Jour-
[fol. 42] nal of the proceedings of said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness my official signature and the seal of said Court at Toledo, in said District, this 23rd day of April, A. D. 1923, and the 147th year of the Independence of the United States of America.

B. C. Miller, Clerk, by Lelia Garrett, Deputy Clerk. (Seal.)

NOTE.—A similar order and decree was made and entered in the District Court of the United States for the Southern District of Illinois, Southern Division, on December 30, 1922.

Ancillary proceedings were commenced in this Court on October 23, 1914, by the filing of a bill and answer similar in substance to those filed in the District Court of the United States for the Northern District of Ohio, Western Division, and upon these pleadings the Illinois District Court entered an order on the date the bill was filed, as aforesaid, assuming jurisdiction in this cause in aid of the receivership, and appointing Walter L. Ross, Receiver.

COLLOQUY BETWEEN COUNSEL

Mr. Hocker: Can we agree that the property was turned over in pursuance of that order, as directed by the order?

Mr. Polak: That will let the Receiver out, but I expect we can. See if this will get it in, Mr. Hocker: It is also admitted that the property was returned to the Toledo, St. Louis and Western Railroad Company on midnight of [fol. 43] December 31st, 1922, in pursuance with the terms and orders of the decree that has just been offered in evidence.

Mr. Hocker: That is all right.

Mr. Hocker: Of course, these photographs were taken with the idea of showing the locus in quo; they don't purport to show the conditions at the time of the accident, as to the actual location of cars, as I understand.

Mr. Polak: Well, no; they don't purport to show exactly what cars were there, but they do show the location of the track at the place of the accident.

Mr. Hocker: In order to dispense with this photographer, I think we can make an admission about these photographs. We will admit that these photographs, Ex-

hibits indicated B, C, D and E, represent, as far as could be ascertained, the locus in quo and the location. I will admit that these photographs were taken by a photographer, and properly taken.

Mr. Polak: Mr. Thompson was out there at the place where the accident happened.

Mr. Hocker: In the general locus of where Mr. Allen was injured. Can't you identify it by your witnesses?

Mr. Polak: Yes; you will make no point on that?

Mr. Hocker: I will make no point on the accuracy of the photographs, being Plaintiff's Exhibits B, C, D and E.

[fol. 44] Joseph J. Murdock, of lawful age, was thereupon called as a witness, and being first duly sworn by the clerk to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination by Mr. Polak:

Q. Will you please state you name to the jury?

A. Joseph J. Murdock.

Q. Where do you live, Mr. Murdock?

A. East St. Louis, Illinois.

Q. Do you know the plaintiff in this case, Hilbert Stuart Allen?

A. Yes, sir.

Q. Mr. Murdock, were you foreman in charge of a switching crew in the Madison yards of the Toledo, St. Louis and Western Railroad Company on the night of October 27th, 1922?

A. Yes, sir.

Q. Who comprised that switching crew besides yourself?

A. Engineer Daniels, Fireman Moreline and Switchmen * * * and Allen.

Q. Those switch yards—will you describe the general direction in which they run, in which the tracks run which comprise what is known as the switching yards over there?

A. East and west.

Q. Now, the main line runs east and west, doesn't it?

A. It runs parallel with the yards.

Mr. Hocker: A litle bit louder.

Mr. Polak:

Q. Mr. Murdock, you were foreman of the switching crew?

A. Yes, sir.

Q. And did that train, just before the accident complained of, did that crew pull a lead of cars up No. 9 track, or No. 9 lead, as they call it?

A. A lead of cars?

[fol. 45] Q. Pull a train of cars?

A. Number 9 lead?

Q. Yes.

A. I don't know where No. 9 lead is.

Q. Well, you know where track 4 is and where track 5 is?

A. That is the eastbound lead.

The Court:

Q. Can you speak louder, Mr. Murdock? The jurors have got to hear.

Mr. Polak:

Q. Talk as loud as I am talking, if you can, Mr. Murdock. Do you know where track 4 is?

A. Yes, sir.

Q. Do you know where track 5 is?

A. Yes, sir.

Q. And 6?

A. Yes, sir.

Q. And 7?

A. Yes, sir.

Q. And 8?

A. Yes, sir.

Q. And 9?

A. Yes, sir.

Q. Now, is there a lead that goes diagonally across those tracks?

Mr. Hocker: Call that a lateral, don't you?

Mr. Polak:

Q. No, a lead; I think they call that a lead, don't they?

A. That is what we plainly speak of as a lead, but it is known as the loader track.

Q. A loader track?

A. Yes, sir.

Q. You men know it as a lead?

A. Yes, sir.

Q. It cuts diagonally across the tracks, don't it?

A. Yes, sir.

Q. Now, Mr. Murdock, do you remember the night Mr. Hilbert Allen was injured?

A. Yes, sir.

Q. Do you know about what time of night or day that was?

A. About 1:15 a. m.

Q. And was that on October 27th, 1923?

A. The morning of October 27th.

Q. The morning of October 27th, 1923?

A. 1922.

Q. 1922, I mean. Pardon me. That was in the company's yards there at Madison?

A. Yes, sir.

[fol. 46] Q. Just before that accident had the engineer, Mr. Daniels, and Mr. Moreline and you men in the switching crew pulled a string of cars up that lead?

A. Yes, sir.

Q. Before any cars were kicked down on No. 4?

A. No, sir; we put fourteen cars in on No. 4 before I pulled.

Q. Before you pulled out?

A. Yes, sir.

Mr. Hocker: A little bit louder.

Mr. Polak: He said he put fourteen cars down before he pulled up this lead.

Q. That is what you said?

A. Yes, sir.

Mr. Hocker:

Q. On No. 4?
A. Yes, sir.

Mr. Polak:

Q. And that was how long before this accident that you did that?
A. Well, I presume about twenty or thirty minutes.
Q. About twenty or thirty minutes?
A. Yes, sir.
Q. Now, after putting those fourteen cars down there, what did you do, or what did the train do?
A. Put those fourteen cars in No. 4.
Q. Then what happened?
A. We were making up this train on No. 5.
Q. Yes. Then, did you back or go down on the lead that we have just talked about to get some cars?
A. Yes, sir; went down track 9.
Q. Where did you pull those cars, in what direction?
A. Pulled them east.
Q. East?
A. Yes, sir.
Q. On that lead?
A. On the lead to the main line; yes, sir.
Q. Now, then, in going from the lead to the main line did you first cross the, say No. 9 track and then 8, and 7, and 6, and 5, and 4?
A. We did not cross them, we crossed the switches leading to those.
[fol. 47] Q. Crossed the switches where they connect to the lead?
A. Yes, sir.
Q. You did that, did you?
A. Yes, sir.
Q. Now, did you cause two cinder cars to be kicked down on track 4?
A. Kicked two cinder cars in on track 4; yes, sir.
Q. On track 4?
A. Yes, sir.
Q. And it was one of those cars wasn't it, that struck Mr. Allen?

Mr. Hocker: Well, he didn't see it.

A. I did not see the accident.

Q. But as you afterwards found out, it was one of those two cinder cars that was kicked down there that struck Mr. Allen, wasn't it?

A. Yes, sir.

Q. As far as you know?

A. As far as I know; yes, sir.

Q. Did you give the signal for those cars to be kicked down there?

A. Yes, sir.

Q. What kind of signal did you give, Mr. Murdock?

A. Regular highball.

Q. You gave the highball?

A. Yes, sir.

Q. What does the highball mean; does that mean to kick them?

A. In switching; yes, sir.

The Court:

Q. That is given with a lantern?

A. Yes, sir.

Mr. Polak:

Q. You gave that with a lantern by swinging it out like that?

A. Yes, sir.

Q. That is what is called the highball?

A. Yes, sir.

Q. Now, Mr. Murdock, there is also a slow signal you give for kicking, something like that.

A. The coming ahead signal; yes, sir.

Q. Sir?

A. A coming ahead signal.

Q. Coming ahead signal?

A. Yes, sir.

Q. But you gave the highball?

A. Yes, sir.

[fol. 48] Q. That meant to kick them hard?

A. Yes, sir.

Mr. Hocker:

Q. It meant what?
A. It meant to kick the cars.

Mr. Polak:

Q. Well, it meant to kick them harder than a slow signal would have meant, didn't it?
A. Yes, sir.

The Court:

Q. Does that mean that they are coupled then;
A. Uncoupling them as we are kicking them.

Mr. Hocker: I can't hear, Mr. Murdock. Can you speak a little louder, please sir?

The Court: I was asking him if it was not a fact the only time they kicked them is when they are uncoupled, and he said, "Yes, sir."

Mr. Polak:

Q. I know, Mr. Murdock, you gave that signal and uncoupled the cars, and then gave the stop signal?
A. Yes, sir.
Q. Did you do that on that occasion?
A. Yes, sir.
Q. Who pulled the pin to let those cars go down there?
A. I pulled the pin myself.
Q. When you did that did you see Mr. Allen working down there on track 5?
A. Not at that moment.
Q. Well, at the time you gave the signal, did you see him down there?
A. I saw he was working between tracks 3 and 4.
Q. Between tracks 3 and 4?
A. Yes, sir; I mean 4 and 5.
Q. You saw him working between tracks 4 and 5. And you saw him there when you gave that signal, didn't you?
A. Yes, sir.

Mr. Hocker: One moment.
Mr. Polak: He said "Yes."

Mr. Hocker: I object to the leading character of the examination, your Honor please.

[fol. 49] Mr. Polak: Well, I will try not to do that, Mr. Hocker; I should not have done it.

Mr. Polak:

Q. How was that engine facing; was the engine backing or——

A. He was heading west, backing east.

Q. Heading west; by that you mean that the pilot was west; is that what you mean?

A. The pilot of the engine was west; yes, sir.

Q. The pilot of the engine was west, then came the tank?

A. Yes, sir.

Q. And then the cars?

A. No, sir.

Q. Well, were the cars attached?

A. The cars were attached to the engine, head of the engine; we was working west.

Q. That is right, the cars were attached to the head of the engine, or pilot of the engine, if there had been a pilot; this was a switch engine, a step instead of a pilot?

A. Yes, sir.

Q. The cars, then, were attached to the head of the engine. What side of the engine, in the cab, would that put Mr. Daniels, the engineer, in?

A. The north side.

Q. On the north side?

A. Yes, sir.

Q. Were you in communication with the engineer by signaling him either directly or by relaying it through some other signal?

A. By relaying.

Q. By relaying; and who was the man you relayed it through?

A. Mr. Allen.

Q. George Allen?

A. George Allen.

Q. You mean George, G-e-o-r-g-e Allen, the son of the plaintiff, H. S. Allen?

A. Yes, sir.

The Court:

Q. What is he known as?

A. Pardon me?

[fol. 50] Q. What is he known as, switchman?

A. A switchman; yes, sir.

Mr. Polak:

Q. You are known as the switch foreman?

A. Yes, sir.

Q. And was a fellow by the name of John Jacks there with you?

A. Yes, sir.

Q. Where was he at the time?

A. He was on the lead, at No. 4 switch.

Q. On the lead at No. 4 switch?

A. Yes, sir.

Q. Who would throw that switch; who did on that occasion?

A. Mr. Jack.

Q. And you knew those cars were going down on No. 4?

A. Yes, sir.

Q. You saw Mr. Allen working between four and five?

A. Yes, sir.

Q. You saw his lantern, did you, Mr. Murdock?

A. Yes, sir.

Q. About how far was he east of you at that time?

A. At the time I kicked the cars?

Q. Yes.

A. Well, I presume he was about a hundred yards, one hundred and twenty-five yards.

Q. One hundred or one hundred and twenty-five yards. You had been a car checker yourself, hadn't you, Mr. Murdock?

A. Yes, sir.

Q. How long had you been a car checker?

A. Approximately about seven years.

Q. Had you been a car checker in those yards?

A. No, sir.

Q. Never had been a car checker in the yards there at Madison?

A. No, sir.

Q. But you are familiar, are you not, with the way car checkers work, what their duties are, and so forth?

A. Yes, sir.

[fol. 51] Q. As car checkers; explain to the jury how they go about their work?

A. Well, they have to carry a lantern.

Q. Now, assuming a man is right handed, which hand would he have the lantern on?

A. Would have it on his left arm.

Q. And can you illustrate to them there, Mr. Murdock, supposing the wall behind you is a car, or the window is a car; show them how you check those cars.

A. How I would check them?

Q. Yes; how you did and how other car checkers checked.

A. I would check them; I would be facing the east.

Q. You would face the car you checked, wouldn't you?

A. No, sir.

Q. Sir?

A. No, sir.

Q. Well, just assume that that calendar there behind you now is the situation of the car, show how you would check it?

A. This way; stand aside of it.

Q. Where do you hold your lantern?

A. In the left arm.

The Court:

Q. The lantern doesn't hang down on your arm; it sets up?

A. Sets up.

Mr. Polak:

Q. Don't your lantern hang by the bail in the crook of the arm?

A. It sets up on top.

Q. You set the lantern in the crook of the arm?

A. Yes, sir.

Q. But you could hang it by the bail?

A. Couldn't see nothing if it hung by the bail.

Q. You place that lantern up like this; is that right?

A. Yes, sir.

The Court:

Q. You use the handle for a purpose, don't you?
A. Yes, sir.
[fol. 52] Q. If you had one I would show you how to do it.

Mr. Polak:

Q. Well, Mr. Murdock, I will ask you to state if it is not a fact that in checking, the regular and customary way is to hold the lantern hanging there in your arm and hold your pad, or whatever you are writing on here, and face the number which you are getting?
A. Not necessarily face the number; no, sir.
Q. You look at it like this, do you?
A. I look at it sideways; yes, sir.
Q. That is what you just said; you look at this and hold it this way, and, look here, if you were checking cars over south of you?
A. Yes, sir.
Q. You would face east?
A. Yes, sir.
Q. Now, if you were facing the cars you could get the numbers at a glance, couldn't you?
A. Well, not any more so than you could.

Mr. Hocker: I can't hear you.

Mr. Polak:

Q. You could get them just as well facing this way and looking over to the side, as though you were facing this way, could you?
A. Yes, sir.
Q. Mr. Murdock, at the time you pulled those cars up there on this lead, what were you doing; what were you making up, what kind of a train?
A. I had train orders for 2:30 a. m.
Q. You had a train going out at 2:30 a. m.?
A. Yes, sir.
Q. Could it have been 2:15, Mr. Murdock?
A. No, sir; the order read 2:30.
Q. You have looked that up, have you, lately?
A. No, sir.

Q. When did you look it up; do you remember, do you just remember that?

A. Yes, sir.

[fol. 53] Q. Well, that train, no matter whether it was 2:15 or 2:30, that you were making it up for, where was it bound for?

A. Bound for the east points, in Indiana and Ohio.

Q. Can't hear you; where, east?

A. East; yes, sir.

Q. And then what else did you say?

A. To points in Indiana and Ohio.

Q. The cars were to go to points in Indiana and Ohio?

A. Some of them, but the——

Q. That was that 2:30 train you were making up; is that correct?

A. Yes, sir.

Q. These cars, these two cinder cars that you kicked down there, what were the numbers of them, Mr. Murdock; the two cinder cars that were kicked down there?

A. As near as I can recall is C-102 and C-61.

Q. Those cars are just alike, aren't they, cinder cars?

A. In construction; yes, sir.

Q. Are they what is called hopper bottoms?

A. No, sir; they are not hopper bottoms.

Q. Well, how is the coal let out of them, side opening?

A. They are to be used for cinders only.

Q. Used for cinders; well, I meant cinders; I said coal.

The Court:

Q. Do you shovel the cinders out?

A. No; got doors on the sides.

Q. Side doors?

A. Yes, sir.

Mr. Polak:

Q. They open on the sides, Mr. Murdock, do they?

A. Swinging doors on the side; yes, sir.

Q. Swinging doors?

A. Yes, sir; on the side.

Q. When you go to dump your cinders out, do those doors swing out like that?

A. Swing out; yes, sir.

[fol. 54] Q. They are side-opening cinder cars?
A. Yes, sir.
Q. Were they both side-opening cinder cars?
A. Yes, sir.
Q. Both exactly the same kind of car?
A. Yes, sir.

The Court:

Q. Where are those side openers, below the box?
A. Sir?
Q. Where do they open, below the side of the car?
A. The side, the doors, you mean?
Q. Yes.
A. They are above the sill.
Q. Above the sill?
A. The side sill; yes.
Q. Not what you call a gondola, are they?
A. No, sir.

Mr. Polak:

Q. Mr. Murdock, in checking cars along the tracks, track 5 or any track, does the car overhang the track any?
A. The rails?
Q. Does the car overhang the rails?
A. All cars hang over the rails.
Q. All cars overhang the rails?
A. Yes, sir.
Q. These cinder cars overhung the rails about how far, if you know?
A. I do not know.
Q. You do not know; but you know that there is quite an overhang, don't you, Mr. Murdock?
A. The same as other cars; yes, sir.
Q. And the same way with these cars he was checking; you knew that was an overhang to those cars?
A. Yes sir.
Q. Can you give us approximately what the overhang of a car is; that is, how far it overhangs the rail?
A. Well, from eighteen inches to twenty-four.
Q. Eighteen inches to what?
A. To about twenty-four.
Q. From about eighteen inches to two feet?

A. I should judge; yes, sir.

[fol. 55] Q. And in checking these cars, can you stand right up against them, or have you got to stand far enough away from them to see the number and initial?

A. There is a clearance between them.

Q. There is a place between the tracks?

Mr. Hocker:

Q. How is that?

A. There is a clearance between them, the tracks.

Mr. Polak:

Q. You mean there is a space between the rails of the two tracks?

A. And between the cars also.

Q. I did not ask you about the cars, but I asked you if you could stand right up against the cars, or do you have to stand back a little ways from the cars in checking them?

A. It is not necessary to stand up against them; no sir.

Q. You can't stand up against them; isn't that what you mean?

A. Oh, you can; yes, sir.

Q. You can stand right up against them and still check them?

A. Yes, sir.

Q. How long had you been working for the railroad at that time, Mr. Murdock?

A. Toledo, St. Louis?

Q. Sir?

A. Toledo, St. Louis and Western?

Q. Yes.

A. Since the latter part of September.

Q. September of what year?

A. 1920.

Q. 1920?

A. That is the last time previously I worked for them.

Q. Mr. Murdock, can you talk a little louder, we can't hear you. You had been working there the last time since September, 1920?

A. Yes, sir.

Q. As switching foreman, or foreman of the switching crew, whatever the term is?

A. Switchman and foreman.

[fol. 56] Q. Switchman and foreman both?

A. Yes.

Q. Mr. Murdock, were you present in the office when Mr. Hilbert S. Allen was given the orders to check this train, or check these cars?

A. He was in the office at the time I got the order.

Q. He was in the office at the time you got the orders to perform your switching duties in getting out that train at 2:30; I understand that; but were you there when he got orders to check the cars on 5, when Mr. Flack gave him the orders?

A. Mr. Flack gave him the same orders as I did; they are for 2:30.

Mr. Hocker:

Q. How is that?

Mr. Polak:

Q. Mr. Flack gave him the same orders that I got, the train for 2:30. What time was it, then, Mr. Murdock?

A. About 12:15.

Q. Are you sure of that time?

A. About that; yes, sir.

Q. What time was this accident?

A. One fifteen.

Q. How many cars were in that train that he was checking there on 5, if you know?

A. There was nineteen at the time of the injury.

Q. Did you know that when Mr. Flack gave you the instructions, and when he gave him those instructions?

A. There was no cars on the track.

Q. Sir?

A. There were no cars on the track at the time I got the orders.

Q. There were no cars on track 5?

A. No, sir.

Q. Did your crew put them there?

A. Yes, sir.

Q. How long before the accident were those cars put on track 5?

A. About twenty or thirty minutes.

Q. Before September, 1920, had you worked there in the yards for the Toledo, St. Louis and Western Railroad before that?

A. November 16th to April 8th, 1920.

[fol. 57] Q. Well, November, 1918, you mean?

A. November, 1916.

Q. Oh, you had worked there from November, 1916?

A. Yes, sir.

Q. Had you been a switchman all that time?

A. Yes, sir.

Q. Now, those eastbound yards and westbound yards, I believe you men working over there call some eastbound and some westbound; but state whether or not those yards are all just one network of tracks?

A. It is all one network of tracks.

Q. You don't know the distance between the rails of the different tracks, do you, Mr. Murdock?

A. No, sir.

Q. Do you know the distance between rail to rail, any of those tracks, the standard gauge?

A. That is, the track itself?

Q. Yes.

The Court:

Q. You mean the track itself, where the cars——

A. The standard gauge, four foot eight inches, if I can recall it.

Mr. Polak:

Q. Four foot eight and one-half inches, you say, four foot eight?

A. Four——

Q. I won't quarrel with you about the half inch, but you know it is either four foot eight or four foot eight and one-half inches?

A. Yes, sir.

Q. Now, when you gave that highball signal, after that state whether or not you gave a stop signal as the cars were cut loose?

A. I did give a stop signal.

Q. Did the cars then go on down west on track No. 4?
A. Yes, sir.
Q. How fast were they going, about?
A. When they entered there they was going about six miles per hour, four to six miles per hour.
[fol. 58] Q. Four to six miles per hour?
A. Yes, sir.
Q. State whether or not when those cars go along without an engine behind them, whether they make any noise?
A. They do when they strike the ends of the rails.

Mr. Hocker:

Q. What is that?
A. Connections to the rails.

Mr. Polak:

Q. They do when they strike injured rails. Well, are there any injured rails along there?
A. I did not state injured rails.
Q. Sir?
A. It is the ends of the rails or connections.
Q. You mean when they go into a switch and strike anything, strike a switch point; is that what you mean?
A. No, sir; connections to the rails, where the rails connect.

Mr. Hocker:

Q. Joints?

Mr. Polak:

Q. The rail joints, you mean?
A. Joints; yes, sir.
Q. Now, state whether or not those cars come along noiselessly, without making much noise, if there is no engine or cars, something pushing them or pulling them?
A. Don't make very much noise; no, sir.
Q. Don't make very much noise?
A. No, sir.
Q. Did the engine bell sound before those cars went down there?
A. No, sir.

Mr. Hocker: Object to that as immaterial.
The Court: Well, he has already answered.
Mr. Hocker: What did he say?
Mr. Polak: He said no; didn't you, Mr. Murdock?
The Witness: Yes, sir.
[fol. 59] Mr. Hocker: Move that that be stricken out as immaterial.
The Court: That may stand.
Mr. Polak: What is your Honor's ruling?
The Court: I say, that may stand.
Mr. Hocker: Exception.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by his counsel, then and there duly objected and excepted and still continues to object and except.

Mr. Polak:

Q. Did you give this man Allen any warning of any kind that those cars were coming down there?

Mr. Hocker: I object to that as calling for a conclusion.

Mr. Polak:

Q. State what you did.

Mr. Hocker: There is no charge.
Mr. Polak: I will withdraw it, Mr. Hocker.

Mr. Polak:

Q. State what you did before those cars were coming down there in the way of notifying him or letting him know those cars were coming.

Mr. Hocker: One minute. I object to that as calling for a conclusion, what he did; he may—he can state anything he may have done there without it being concluded by the gentleman's question.

Mr. Polak:

Q. State just what you did then, Mr. Murdock, as those cars were kicked down there?

The Court:

Q. Did you do anything other than give the highball and the stop signal?

A. No, sir; nothing out of the ordinary; no, sir.

[fol. 60] Mr. Polak:

Q. That is all you did?

A. Yes, sir.

Q. I will ask you whether or not the whistle was blown?

Mr. Hocker: I object to that as leading and suggestive and immaterial.

The Court: He may answer; he said he did not do anything other than——

Mr. Polak: He did not have charge of the whistle, your Honor.

The Court: All right; go ahead.

Mr. Polak: All right; I will withdraw it.

Mr. Polak:

Q. Mr. Murdock, what time did you go to work; what were your hours that night?

A. Twelve midnight to 8 a. m. that morning.

Q. From 12 to 8?

A. Yes, sir.

Q. Before giving the order to switch these cars, what had you done?

A. Nothing.

Mr. Hocker:

Q. What did you say?

A. Nothing.

Mr. Polak:

Q. Do you mean that that was your first duty?

A. That was the first orders I received; yes, sir.

Q. That is the first order you received. Now, when you got those orders where was Mr. Moreline and Mr. Daniels?

A. They were on the engine; getting the engine ready.

Q. What time do they go to work?

A. They go to work at 12 midnight.

Q. Now, just about what time was it, if you know, that you got these orders about making up the 2:30 train; I shall say 2:15, but whatever you say, 2:15 or 2:30 train?

A. About 12:15.

Q. The first orders you got?

A. Yes, sir.

Q. Sending these fourteen other cars down on this track that you have stated about—was that part of making up [fol. 61] that same eastbound 2:30 train?

A. No, sir.

Q. But you had done that before, had you?

A. I did that along with making this other train up.

Q. Well, you did that along with making up the other train?

A. Yes, sir.

Q. Well, you did that along with making up the other train?

A. Yes, sir.

Q. Can you say how long you had been at work when this accident happened?

A. I go to work at 12 o'clock; the accident happened at 1:15.

Q. Now, what was the first you knew that anybody had been hurt?

A. Well, after I kicked the two cars of cinders to track No. 4, I made another pass or two which I cannot recollect.

Mr. Hocker:

Q. A little louder, please.

A. Another switch or two, I cannot recollect which, from the lead, and I heard Mr. Allen calling, which was nothing out of the ordinary.

Mr. Polak:

Q. You mean, the accident was nothing out of the ordinary?

A. No; him calling.

The Court: Calling, he said.

Mr. Polak:

Q. So when you got there, who was there besides the man that was injured?

A. No one.
Q. You were the first man there?
A. Mr. Jack and myself.
Q. Johnny Jack?
A. Yes, sir.
Q. And you?
A. Yes, sir.
Q. Where was George Allen, the son of the injured man?
A. He was out at the main-line switch relaying signals.
Q. Where was Mr. Allen, H. S. Allen, the injured man, when you got there?
A. He was lying between track 3 and 4.
[fol. 62] Q. Now, what direction would that be from track 5?
A. Be north of track 5.
Q. North of track 5?
A. Yes, sir.
Q. About how far was he from, we will say, the center, between track 4 and 5?
A. From the center of track 4 and 5?
Q. Yes. Now, take a line running down between tracks 4 and 5, and split that right in two, right the middle part of that line there, or rather the middle part of that space, and again going north to where he was, about how far was he north of that imaginary line?
A. About twelve or thirteen feet.
Q. And what was his position?
A. Mr. Allen's?
Q. Yes.
A. He was lying with his head facing east.
Q. What direction was his body?
A. East and west.
Q. East and west. Now, can you place his position there with reference to the north rail of track 3?
A. He was south of the south rail.
Q. Where was he—let me see if I can get this straight—at the time when the cars were kicked down there he was between tracks 4 and 5, wasn't he?
A. I presume; yes, sir.

The Court: Do you want to complete this examination, or can we put it over until morning?
Mr. Polak: Whatever your Honor wishes.

Mr. Hocker: He will have to be back tomorrow.

The Court: He will have to be back tomorrow, and the jurors, I am sure, will have to be back.

Gentlemen of the jury, at this time I again want to admonish you, as I have in previous cases, not to discuss this case among yourselves, or with others, or permit yourselves to talk to or allow others to talk to you about this [fol. 63] case until it is submitted to you for your consideration. We will now adjourn court until tomorrow morning at 10 o'clock.

Adjournment. At this point, 4:59 o'clock p. m., court adjourned until 10 o'clock the following morning.

Reconvene December 7th, 1923, 10 o'clock a. m. At this point, pursuant to adjournment as heretofore set out, court was duly reconvened on this day and date, at the hour herein set out, and all parties and the jury being present as before, the following proceedings were had:

Joseph J. Murdock resumed his place on the witness stand and testified further as follows:

Direct examination (continued) by Mr. Polak:

Q. Mr. Murdock, when you testified yesterday about the manner in which you checked cars, that you could check them without facing the cars, just go along without—were you referring to daytime or night?

A. Any time.

Q. Any time?

A. Yes, sir.

Q. At night, is it necessary for you to face the cars that you are checking to get the initial and the mark on there showing its destination and the car number?

A. Well, no more so than daylight.

The Court: Speak louder, Mr. Murdock. My God, we have a hard time getting witnesses to talk up.

Mr. Polak:

Q. Not any different than in daytime, and the nighttime is all the same?

A. Yes, sir.

[fol. 64] Q. Would that depend any on the size of the initials on the car, and the number, and so forth?

A. Well, it would depend on how plain they are.

Q. Well, you could see them plainer in daytime than you could at night, couldn't you?

A. That all depends on the weather.

Q. Well, the night in question was a dark night?

A. Starlight.

Q. Starlight?

A. Yes, sir.

Q. But were the yards lighted up in any other way outside of the stars?

A. No, sir.

Q. Before those cars were kicked down in there, Mr. Murdock, could you have signaled the engineer to stop before you pulled those pins?

A. Yes, sir.

Mr. Hocker: One moment. I object to that as calling for a conclusion, not required under the facts in the case.

Mr. Polak: I asked him if, before the cars were kicked back and before he pulled the pin, if he could have signaled the engineer and given a stop signal; he answered "Yes." Mr. Hocker objected.

Mr. Hocker: I did not hear him.

Mr. Polak: I did not want to get the answer in before the objection; however, I think it is proper.

Mr. Hocker: I move to strike it out.

The Court: All r*gi*ht. He is the man who pulled the pin; I suppose he could have kept——

Mr. Polak: I should think he ought to know what he could have done under the circumstances. I understood the Court to rule that I could ask that question?

The Court: I haven't ruled at all. I said, I suppose he is the man that pulled the pin; I don't know whether he [fol. 65] could or not. Well, I will let the answer stand.

Mr. Hocker: The point is this, your Honor: There is no duty upon this gentleman to do any such thing under the

law or under the circumstances, and he is asking for a bald conclusion with respect to that.

The Court: Hasn't shown—laid any foundation for it so far that I could see.

Mr. Polak: If the Court please, I understand Mr. Murdock testified that he saw Mr. Allen working down there with a lantern——

The Court: Well, the question is, he saw him when, when he came out?

Mr. Hocker: The law is, as I understand it, your Honor please, that in these yards there is no duty when you see a man working along, checking cars, it is not like a place where strangers come, where the public comes; the law is that they must protect themselves and watch out; you don't have to have a man on the end of every car; don't have to signal, and conditions under which that work is necessarily performed make it impossible, impracticable, that a thing of that kind could be done; that seems to be the law as I read the cases.

Mr. Polak: As I understand, your Honor, that would apply to a switchman; the switchman gives a signal and he would be bound to watch out for himself. Here is a man checking cars; he don't know when these cars are coming.

Mr. Hocker: Why don't he know? He is in position, when he has all his faculties, he is in the same position as a switchman. The law is, as I read the cases, that there is no duty to warn—there is no duty unless a man sees an- [fol. 66] other oblivious of his peril and about to be run over. Of course, then, humanity requires that something be done, but where a man is going out performing the ordinary duties of a car inspector, the men who are operating there have a right to assume that he will see what is obvious, and that seems to be the cases as I read them.

Mr. Polak: Here is a case by the Supreme Court of Missouri in which Judge Blair holds the federal employee's liability——

The Court: That is argument.

Mr. Polak: Now, then, it would be for the jury to say whether this man is in a perilous position, and whether he was oblivious of his peril, and whether this man, by the exercise of ordinary care, could have warned him or stopped those cars before they went down there.

Mr. Hocker: There is no evidence here that this man was either in a position of peril or oblivious of——

The Court: Well, he has already answered he could have stopped them.

Mr. Hocker: I move that it be stricken out. I did not hear his answer. Mr. Murdock speaks so low I did not know he had answered it. For that reason I move that the answer be excluded.

The Court: I am not so sure whether he saw the man. I will strike it out until you lay a better foundation.

Mr. Polak:

Q. Mr. Murdock, when those cars and that engine were pulled up that lead before they were kicked down on track 4 where was Mr. Allen working, if you know?

A. Well, I saw a light down between tracks 3 and 4; I presume it was Mr. Allen.

[fol. 67] Q. That was before he had gone out to the number 4 switch?

The Court:

Q. Do you mean 3 and 4?

A. Tracks 4 and 5.

Q. Yes, you corrected that last night; that is the reason I——

Mr. Polak:

Q. And you say you presumed that was Mr. Allen?

A. Yes, sir.

Q. Now, then, when you had gotten up to 4 switch, before the cars were kicked down there, did you still see the man with that light?

A. There was a light down there.

Q. And how near was that to the time when you gave the signal, the highball?

A. Well, that was just a few minutes before, maybe a minute or two.

Q. Maybe a minute or two before you gave that signal?

A. Yes, sir.

Q. And that was the last time you looked down that way, wasn't it, before you gave the highball?

A. Yes, sir.

Q. And you testified, didn't you, Mr. Murdock, that you had been a car checker and knew the way that cars had to be checked?

A. Yes, sir.

Q. I don't recall, but did you testify that you knew the width between tracks four and five, from rail to rail?

A. I did not know exactly; no, sir.

Q. You did not know that?

A. No, sir.

Q. But you did testify that you knew that the cars overhung from eighteen to twenty-four inches?

A. Yes, sir.

Q. Mr. Murdock, do the cars stick out any distance beyond the rail?

A. About eighteen inches.

Q. Can a car checker stand on the ties in checking, or does he have to walk clear of the ties and be further out in [fol. 68] that path?

A. If there is no cars there, he can stand on the ties; if there is cars there he cannot.

Q. If there is cars there he cannot stand on the ties?

A. No, sir.

Q. How far do you say those ties stick out?

The Court: He said eighteen inches.

Mr. Polak:

Q. Well, in those yards, I will ask you if it is not a fact that there are some crossties and some switch ties, and whether or not it is a fact that the switch ties are a great deal longer than the crossties?

Mr. Hocker: There is no evidence that there is any switch here so it is not material, it seems to me.

Mr. Polak: I am just asking him this—I will withdraw the question, your Honor.

Mr. Polak:

Q. In railroad yards, and in this yard, I will ask you to state whether it is a fact that ties are used, some crossties and some switch ties, instead of all regular length ties, as they do on the main line?

Mr. Hocker: Object to that as immaterial to this inquiry. There is no claim of negligence or anything of that sort made in this case, and there is no evidence——

The Court: I don't know the purpose.

Mr. Hocker: And no evidence at this particular point there was any switch, anything of that sort.

Mr. Polak: I am inquiring about the whole yards; it would tend to show how far the man had to stand out there towards track No. 4.

Mr. Hocker: There is no charge of negligence with respect to that, anything of that kind in this petition.

[fol. 69] Mr. Polak: Well, the petition charges that the space was so narrow that there was only about two feet for men to work in between there, and that the railroad company knew of that narrow space.

The Court: What have the ties to do with the protection?

Mr. Polak: Well, here is the proposition, your Honor. Here is the side of the car, see, that overhangs the rail and he says the ties still stick out further. Now, that would put that man, as he would know, further over.

The Court: No, the rail, the end of the tie is eighteen inches from the track and the car overhangs some eighteen to twenty-four inches, so we must assume that if he is checking a car it is on the track, he would have to crawl under it to get on one of the ties.

Mr. Polak:

Q. Mr. Murdock, how far would a man have to stand away from the car in order to check, and at night, and under the conditions as they were on this occasion?

A. Away from the car he was checking?

Q. Yes; how far away from the car he was checking?

A. Well, he could stand up against it if it was not moving.

Q. Sir?

A. He could stand up against the car if it was not moving.

Q. If he would, if this was the side of the car, could he stand like this and check it?

A. Well, he could use his own judgment on that.

Q. Well, would he naturally stand up like this, or would——

Mr. Hocker: Well, one moment. The jury could say what he would naturally do, all these gentlemen; it is a

[fol. 70] mere matter of looking at something and writing something down; it requires no expert knowledge.

A. The rules of the company——

Mr. Polak:

Q. No, I did not ask you what the rules of the company——

The Court: The question is, could he stand close to the car and still check?

Mr. Polak:

Q. Right up against it, or would he have to stand back some distance?

A. He would have to stand so he could write.

Q. He would have to stand far enough to write and he would have to stand far enough away to see it, wouldn't he?

A. He would have to see it first.

Q. Would he have to get his light there, and further away couldn't he see more of it at a glance than if he got right up against the car at night?

A. That all depends on the position he was in, which way he was facing.

Q. Well, if he was facing the car?

A. Well, the chances are he would have to stand back a little.

Q. Did you testify that those cars, when you kicked them down there, rather when you pulled the pin, and the cars were kicked down there, were going about six or eight miles an hour?

A. Between four and six miles an hour.

Q. Between four and six miles an hour?

A. Yes, sir.

Q. Well, suppose, then, that they were going six miles an hour, and will you take my word for it, then, that it would take them about twenty-five seconds to get down to where Allen was working; you can figure that out.

[fol. 71] Mr. Hocker: One moment, please; that is a matter of calculation, having the distance and the rate.

Mr. Polak:

Q. Well, what I want to ask you, Mr. Murdock, is that those cars going along from four to six miles an hour, could you swing those cars?

A. I don't understand what you mean by swing them.

Q. Jump; put your foot in the stirrup and swing them as they were going; could you have done that?

A. Certainly.

Q. Could—and you have often done that, haven't you, you men in the yards there swing those cars as they are going by, don't you?

A. Yes, sir.

Q. Do the grab irons stick out any on those cars beyond the overhang that you have testified to?

A. All grab irons stick out.

Q. All grab irons stick out; how far do those grab irons stick out beyond the overhang that you have testified about?

A. About two and one-half inches.

Q. Sir?

A. About two and one-half inches.

Q. Well, about four inches, don't them?

A. No, sir.

Q. You say they stick out about two and one-half inches?

A. Yes, sir.

Q. What size iron are they?

A. About ⅝ rod.

Q. About ⅝-inch rod?

A. Yes, sir.

Q. Do you know how wide they are, the length of the rungs of the grab irons?

A. About twenty-four to thirty inches long.

Q. Now, where would the last grab iron be on any of those cars, where are they ordinarily, we will say, on those cinder cars and such as those cars; about how high up on a man does the grab iron come?

[fol. 72] Mr. Hocker: Here are the pictures, if you want to use them.

Mr. Polak: Thanks.

Mr. Polak:

Q. Now, referring to this picture, Mr. Murdock—can I have that marked Plaintiff's Exhibit?

Mr. Hocker: Yes, if you wish.

A. That is not the car.

Mr. Hocker: You better ask him if it was that kind of car.

Mr. Polak:

Q. Your attorney says it is a car. Mr. Murdock says this is not the car.

Mr. Hocker: I don't mean the particular individual car; that is the same type of car?

A. It is the same type of car.

Mr. Hocker: Well, sure, I don't mean to say it is the same car; I don't know what car it is.

Mr. Polak: Mark this "Plaintiff's Exhibit."

(Thereupon, the reporter marked the same "Plaintiff's Exhibit F.")

Mr. Polak:

Q. Now, referring to the photograph marked "Plaintiff's Exhibit F," this grab iron here, about how high is that; where would that strike a man if the man was standing about like that?

A. Above his shoulders.

Q. Above his shoulders?

A. Yes, sir; see, there is two grab irons, one here on the side and one——

Q. Where is the other grab iron?

A. One here, and one here.

Q. Well, I know, there is one here, where is——

A. And one up and down there.

Q. Well, this one up and down; how far does that stick out?

A. Same distance this other one.

[fol. 73] Q. You say that is two inches?

A. Two and one-half inches.

Q. And how high would the lowest part of that up and down grab iron be compared with the height of a man; what part of a man's body?

A. Be about five foot of- the ground.

Q. About five foot off the ground. Now, you say you could have swung those cars by getting on the grab iron?

A. I could have; yes, sir.

Q. Is there a brake at each end of those cars, manual brake?

A. One end only.

Q. One end; which end would that *me*, the east end or the west end of those cars as they were on that night?

A. Well, cars get turned around quite often.

Q. Well, say, if the cars were going west, where were the brakes on this occasion?

A. I could not say.

Q. The brakes would be on the same end as the grab irons, wouldn't they?

A. No, sir; grab irons are on both ends.

Q. Well, a grab iron on one side and the other side of the car, it is at the other side of the car?

A. The grab iron is on all four corners.

Q. All right; was there a hand brake at one end of each of these cars?

A. At one end of each; yes, sir.

Q. Could you have got that car——

Mr. Hocker: Now, one moment. I object to that as immaterial. Certainly there was no situation presented as pictured by the witness which would require him to get on these cars to attempt to make a stop, if that is the purpose. That could be the only purpose; it seems to me that this is entirely immaterial and outside of any issue. There is no [fol. 74] showing of any danger, or any appearance of danger, that would justify this man jumping on this car and attempting to stop it.

Mr. Polak: There is this appearance, then. He testified——

Mr. Hocker: Why, he sees a car inspector looking at cars down the street.

The Court: You haven't shown he has realized any danger from the time he first saw this light until the present time, or any time between that.

Mr. Polak: Well, your Honor, of course if the witness, if the man was in——

The Court: Well, if he did not, if he thought, in the first place, he was in danger from the cars, then that is a different proposition.

Mr. Polak: Yes, but it is a question of fact for the jury, isn't it?

The Court: But you have got to have something to base it upon, that he realized, or should have realized, after he had cut them loose that he made a mistake, and then chase the cars.

Mr. Pollak: Well, I have shown that he knew the cars——

The Court: I know, you have shown that he knew it, and the cars were cut off.

Mr. Pollak: Well, does your Honor rule that I can show what he did or did not do to prevent sending these cars down there before?

The Court: That is all.

Mr. Pollak: And that after he had sent them down there he did not have to make any effort?

The Court: Well, he did not look any more and did not pay any further attention to the light, I take it, from the testimony.

[fol. 75] Mr. Polak:

Q. Well, after you gave the highball and these cars were kicked down there and you pulled the pin, did you look down again towards the lantern?

A. No, sir.

Q. You are in the employ of the railroad company, Mr. Murdock, are you?

A. Yes, sir.

Q. Switching foreman?

A. Yes, sir.

Q. And you and the others, several of the other employes, have been over here since Tuesday, haven't you?

A. I did not understand the question.

Q. You were over here all day yesterday and the day before, were you?

Mr. Hocker: I object to that; what is the purpose of that?

Mr. Polak: I have got a right to show where the man works and what he has been doing.

Mr. Hocker: Oh, yes; I have no objection.

The Court: I suppose he has been here since the case has been set?

Mr. Hocker: This case has been set ever since Wednesday morning, hasn't it, and he is a witness.

Mr. Polak: The case was not set Tuesday. I want to show——

Mr. Hocker: I object to any such inquiry as immaterial, in view of the fact that the witness is his witness.

The Court: If you can show any hostility on the part of this man, it is, or to show some interest.

Mr. Hocker: He has not shown that.

Mr. Polak: I don't take, by your Honor, to mean hostility he has got to show in plain terms that he is sore at me, or anything, but I think by the manner in which he has answered these questions it is indicated that he is a reluctant witness, at least.

[fol. 76] Mr. Hocker: I would not think so; there is nothing here.

Mr. Polack: I won't press the question if counsel objects. That is all, Mr. Murdock.

Cross-examination by Mr. Hocker:

Q. Mr. Murdock, you have been employed about these yards for the railroad company and for the Receiver several years, as I understand?

A. Yes, sir.

Q. How many years, just say that about?

A. Approximately about seven years.

Q. And *as* a part of that time as a car inspector and car checker?

A. No, sir; switchman only.

Q. As a switchman and as a foreman?

A. Yes, sir.

Q. Foreman of the switching crew in a yard is somewhat like that of a conductor out on the road, isn't it?

A. Same thing.

Q. You are in charge of the men?

A. Yes, sir.

Q. And you receive the orders and direct the men, particularly the switchmen, as to what cars to get and where to put them and all that?

A. Yes, sir.

Q. Now, had Mr. Allen been working there for how long, while you were working there?

A. I presume about three years.

Q. About three years; and during that time had his work required him to be out in the yards?

A. Why, he did have a job in the office for a while.

Q. For a while; but for how long had he been engaged in duties that required him to be in the yards approximately?

A. About two-thirds of his time, I presume.

Q. About two-thirds of his time and the latter two-thirds of the time, was it, that is, he was in the office in the early [fol. 77] stages of his employment?

A. As near as I can recall it.

Q. Now, at least for several years you had seen him around, for a year or two you had seen him around in the yards as a car checker, hadn't you?

A. Yes, sir.

Q. And he worked at night, and you worked at night?

A. Yes, sir.

Q. So you had occasion to see him around these yards practically every night?

A. Yes, sir.

Q. And he would go on duty, I believe, at 11 o'clock, according to his statement; you went on duty at 12 o'clock?

A. Yes, sir.

Q. From that time on until some time in the morning you would be in charge of the switching and the making up of trains throughout that yard?

A. Yes, sir.

Q. And Mr. Allen would be engaged in taking the numbers of cars and the numbers of seals on those cars?

A. Yes, sir.

Q. And particularly the cars which were being made into trains; is that true?

A. Yes, sir.

Q. A record is kept of the seal numbers and the car numbers of those cars which are put into outgoing trains?

A. Yes, sir.

Q. And the trainmen use that as a basis of information in handling the load on the road, is that right?

A. Yes, sir.

Q. Now, that requires him and you to be in more or less contact with one another, does it not?

A. What do you mean?

Q. Well, I mean by that, he will be checking up cars or trains that you are putting together there in the yards?

A. Yes, sir.

[fol. 78] Q. And you would see him there every night, practically?

A. Yes, sir.

Q. That is, you would see him there every night that you both worked?

A. Yes, sir.

Q. You would see him there engaged in that work?

A. Yes, sir.

Q. Now, Mr. Allen was a man of about 46 years of age, I believe?

A. Yes, sir.

Q. Looked to be that. And apparently a man of intelligence, wasn't he?

A. Yes, sir.

Mr. Polak: Just a minute, if the Court please, I object to this witness testifying as to the intelligence and other capacities of the plaintiff, whether he looked like——

Mr. Hocker: Well, as far as he observed.

The Court: He may answer.

Mr. Hocker:

Q. He was, as far as you saw, a man of intelligence?

A. Yes, sir.

Q. Yes. And a man of mature years, about 46 years of age?

A. Yes, sir.

Q. Rather a slight man, wasn't he, not tall?

A. No, sir.

Q. Now, in the work that you would do around in the yard, in switching these cars, you were required to use many of these tracks, weren't you?

A. Yes, sir.

Q. You would put a couple of cars in one track, according to the ultimate destination of the car, then you would take cars out of other tracks and put them into another,

and in the final result you would have a train made up ready to go out?

A. Yes, sir.

Q. Now, as I understand you, on this particular morning when you went to work there, somewhere around 12:15, [fol. 79] you received orders or directions to make up a train which was to leave around 2:30 in the morning?

A. Yes, sir.

Q. And you were informed as to what to put in that train, I suppose?

A. Yes, sir.

Q. And you went to work to carry out the orders which you were given with reference to that train?

No response.

Q. I understood you to say yesterday, at the time you received your orders to make up that train, Mr. Allen was there and was told to check that train, that is, to take the car numbers and the seal numbers of the cars, is that correct?

A. Yes, sir.

Q. And who give those orders, a clerk?

A. Night yardmaster.

Q. Yardmaster?

A. Yes, sir.

Q. And were you told, or were you permitted to use your judgment as to where you would make up the train; I notice in this case you used track 5; did you do that pursuant to directions, or did you just happen to use track 5 because it was convenient?

A. Well, there were no cars on track 5 and I made the train up on track 5.

Q. You used your own judgment and made it up on track No. 5, did you?

A. Yes, sir.

Q. And you had already placed on track 5 quite a number of cars?

A. Yes, sir.

Q. Which were to constitute, when all the rest of them were put in there, the train which was to go out at 2:30?

A. Yes, sir.

Q. But, as I recollect your testimony, you said that that train had been made up, that is, all the cars were in the

train except one car of hides, which was going up to Alton?

A. Edwardsville.

[fol. 80] Q. Edwardsville; is that right?

A. Yes, sir.

Q. You had not gotten that car at the time of this accident; had not gotten it out of the mess of cars there and located it on the train?

A. No; not that I can recall.

Q. Now, these particular cars which have been mentioned here, which you described as cinder cars I believe—

A. Yes, sir.

Q. Those were cars which were not used in the transportation of commodites for the public, but were used in connection with taking care of the road and the moving away of your cinders which might accumulate?

A. Yes, sir.

Q. And things of that sort, and this photograph which has been marked "Plaintiff's Exhibit F," is that a fair representation of the type of car?

A. Yes, sir.

Q. Which composed those two that were run down there; were those cars loaded?

A. Yes, sir.

Q. Yes; and when loaded these openings or cuts, or doors, or whatever you might call them, slant from the bottom of the car up towards the middle of the car?

A. The outer side.

Q. So, that the car at the sill—is that what you call the sill there?

A. That is the door there; the sill is just under it.

Q. Yes. The sill there would be narrower than the top part of the car, slightly?

A. Yes, sir.

Q. How much would you say?

A. Well, about five or six inches inside.

Q. About five or six inches. You did not recognize Mr. Allen when you cut these two cars off—you saw a light down there which you assumed to be Mr. Allen?

A. Yes, sir.

[fol. 81] Q. Of course, the public did not come into the yards; nobody came there except those who were occupied in the handling of cars or the checking of cars?

A. Employes only.

Q. Employes only, and only employes who were engaged in work such as you were doing and such as Mr. Allen was doing?

A. Yes, sir.

Q. And there were no streets and no means of access into those yards, to the public?

A. No, sir.

Q. Yes. And when you saw this light down there you assumed that it was Mr. Allen?

A. Yes, sir.

Q. Because you knew that he had a duty to perform in connection with that train?

A. Yes, sir.

Q. Now, was there anyone else besides your crew, your engineer and fireman and your brakeman or switchman engaged in that end of the yard at that time?

A. Well, the car inspectors worked there.

Q. Well, I mean any other engineer operating around there?

A. No, sir; we were the only crew working.

Q. The only crew; was that true of the entire yard?

A. Yes, sir.

Q. There was no other crew in the yard?

A. No, sir.

Q. This was quite a long yard; how long was it?

A. About a half mile long.

Q. Half a mile long and pretty well lined up with tracks; many of them?

A. Yes, sir.

Q. Loaded with cars. This accident occurred at what you termed the west end of the yards, wasn't it?

A. East end.

Q. The east end?

A. The east end of the yard; yes, sir.

[fol. 82] Q. I see; the east end of the yard. Now, you were intending to bring these two cinder cars down onto track 4 and leave them there; is that right?

A. I was to; had orders to get this train, the short load and the empty box cars——

Mr. Polak:

Q. Mr. Murdock, will you please repeat that and talk a little louder; I want to hear your testimony?

A. I had orders to get them short loads and empty box cars for Edwardsville.

Mr. Hocker:

Q. I was not speaking of the train that you were making up. What were you intending to do with these two cinder cars you were putting on track 4?

A. They were to go into the local.

Q. Oh, they were to go into another train?

A. Yes, sir.

Q. And you were to put them in there so they would be convenient to be put in there; were you making up the local?

A. I was making up the local on another track at the same time.

Q. At the same time. Well, you put them on track 4 to get them out of the way so you could put them in the proper place?

A. Yes, sir.

Q. In the local, I see. And when your engine was then down towards the rear end, was it east or west of you?

A. It was east of me.

Q. It was east of you?

A. Yes, sir.

Q. And you had in the train how many cars at the time you cut off these two?

A. Between twenty and twenty-five cars.

Q. Between twenty and twenty-five cars. So that the engine and the fireman and the engineer were somewhere a distance between twenty and twenty-five car lengths further east from you?

A. Yes, sir.

[fol. 83] Q. And that, still further away from where Mr. Allen was?

A. Yes, sir.

Q. And you were working at the west end of this train then, or of this track of cars?

A. Yes, sir.

Q. And Mr. Allen's son was working in the middle of the train to take your signals, was he?

A. Yes, sir; he was relaying signals to the engineer.

Q. And his duty was to receive your signals, you being so far away that you could not pass them on; he would relay the signal you gave to the engineer and in that way he would act in obedience to your directions?

A. Yes, sir.

Q. Now, I suppose you were on the north side of the——

A. Yes, sir.

Q. Of the track four, the engineer?

A. The north side of the lead.

Q. Well, yes.

A. We were working on the lead.

Q. Well, yes, you were working on the lead; which way did the lead turn; did it go straight on down toward the east?

A. Well, northeast and southeast.

Q. Northeast and southwest. And when you—what kind of a signal did you give him when you got your, we will say front end or the east end or the west end of your track, of the cars, to the point where you wanted them to be cut off; did you give any signal, and what was the purpose of that signal?

A. Why, I was kicking the cars ahead, that I thought the proper momentum to take them to the track, and I gave him a stop signal.

Q. Stop signal?

The Court:

Q. When you got them working, running fast enough?

A. Yes, sir.

Q. To carry them to the point of destination, then you [fol. 84] would cut them off and give a signal to the engineer to back up?

A. Yes.

Mr. Hocker:

Q. Now, you stepped in between, did you, took hold of the appliance there and lifted the——

A. Pin, lifted; yes.

Q. The pin, that cut these two cars?

A. Yes, sir.

Q. From the drag, and the drag stopped and these two cars rolled on down at a speed, you say, from four to six miles an hour. Now, at that time did you have any thought, or did it come to your mind at all that Mr. Allen was in any danger from these cars?

A. No, sir.

Q. Were you doing that work as you had been doing it all these years?

A. Yes, sir.

Q. And as you do it when you see inspectors taking numbers of cars?

A. Yes, sir.

Q. As he was doing?

A. Yes.

Mr. Polak: You mean—pardon me.

Mr. Hocker:

Q. Checkers, taking numbers of cars?

A. Yes, sir.

Q. When you saw him he was apparently close to this track five or, yes, track five, taking the numbers?

A. I assume he was.

Q. You assumed; you could not see what he was doing, and you could not see sufficiently clear to identify it as Mr. Allen?

A. No, sir.

Q. But you knew there was no one else there that had any business in that connection; you assume it was he?

A. Yes, sir.

Q. And when you had loosened these cars, or separated these two cars, then you, I suppose, climbed on to the last car and rode on back and began doing other work, switching?

A. I got on another, cut another.

[fol. 85] Mr. Polak:

Q. What, Mr. Murdock?

A. I got on and cut off another one, which I was kicking down the lead.

Mr. Hocker:

Q. You were kicking another one down the lead?

A. Yes, sir.

Q. You did that work, and at what stage of the work that you began to do, that you cut off these two cars, did you hear anything which indicated to you that something had happened—something unusual had happened?

A. I heard Mr. Allen yelling.

Q. That is what I mean; you heard him cry out?

A. Yes, sir.

Q. And what were you doing at that time?

A. I was going down the lead, making that switch down the lead.

Q. Making the other switch?

A. Yes, sir.

Q. You had progressed that far in the work that you were doing in connection with making up these two trains?

A. Yes, sir.

Q. I suppose your local train did not go out until about 7 o'clock, somewhere around there?

A. Seven-fifty.

Q. Seven-fifty; so you were making up this 2:30 train first?

A. Had it made up and was pulling the short loads out of the local on there.

Mr. Polak: Read that last answer.

(Thereupon, the reporter read the answer.)

Mr. Polak:

Q. That was made up from the short loads?

Mr. Hocker: He was pulling some short loads out of the local to put on this 2:30 train, as I understand; is that right, Mr. Murdock?

A. Yes, sir.

The Court:

Q I heard you say something about moving the pin; [fol. 86] was that an automatic coupler, or was it the old pin system?

A. No, it is automatic.

Q. Automatic, just a bar?

A. Yes, sir; it is what is known as the knuckle lock now.

Q. What?

A. It is what is known as the knuckle lock now.

Q. Yes.

Mr. Hocker:

Q. There are not any of the old Lincoln pin couplers any more, are there?

A. No, sir.

The Court:

Q. You don't have to cut them——

Mr. Hocker:

Q. Then you went down to where Mr. Allen was—pardon me, your Honor.

The Court:

Q. I say, you did not have to climb between the cars to pull them?

A. No, sir.

Mr. Hocker:

Q. You say you think when you come across to where you saw this light which you assumed was Mr. Allen was about one hundred and twenty-five yards?

A. It was between that, somewhere within that radius.

Q. Somewhere in that neighborhood?

Mr. Polak:

Q Did I understand your answer to be, it was between that?

A Somewhere within that radius.

Q. Within what radius?

A. One hundred and twenty-five yards.

The Court: One hundred and twenty-five yards.

Mr. Hocker:

Q. You made no measurement about it?
A. No, sir.
Q. But that, in your judgment, was about the distance. Now, is it customary when you kick off, take cars like that and pull the pin and let them roll down, for anybody to be on the cars themselves?
A. No, sir.
[fol. 87] Q. Did they——

Mr. Polak: Just a minute. I am trying to get the witness not to volunteer until I get any objections that I may have in, Mr. Hocker. Pardon me, now. He has asked the witness a question and the answer is made before I have a chance to get in the objection. I ask that the answer be stricken out, and I object to any question as to what the custom might be for the reason that they can't repeal any laws or rules of negligence by what their custom might have been, and if their custom was to do something in a negligent way, it would not alter the fact whether they were or were not negligent.

Mr. Hocker: That is undoubtedly true, your Honor, but I am not undertaking to do that; I am simply wanting to say to show how this work was done, show it was done in that usual way.

Mr Polak: I have no objection to what they did on that occasion; what they usually do, I don't think will throw any light on this inquiry.

The Court: I will let him answer.

Mr. Hocker:

Q. Is that the way you did that on all occasions?
A. Yes, sir.
Q. And the cars would stop when the gravity had, when the momentum had gone out of them, I suppose?

The Court:

Q. When they came in contact with the other cars, I suppose?

A. When they came in contact with the other cars or the momentum had stopped.

Mr. Hocker:

Q. Had you blocked the other cars, set the brakes on?
A. Level yards there; stop themselves.
[fol. 88] Q. How?
A. A level yard; they stop themselves.
Q. I say, if they do come to you, when you set the first car down there, do you set the brake on them?
A. No, sir.
Q. Well, you don't know anything about any contact these cars had with any other cars?
A. No, sir.
Q. That did not enter into this case at all. Now, when you found, when you came to where Mr. Allen was, was he on the inner side of those two cars which had passed on down, that is, was he towards the east and the cars towards the west there, with relation to him were the cars——
A. He was east of the cars.
Q. About how far?
A. About one or two car lengths.
Q. About one or two car lengths. And the cars had stopped after going about one or two car lengths?
A. Yes, sir.
Q. And you say you found him between tracks 3 and 4?
A. Yes, sir.
Q. Did you observe where his lantern was?
A. It was lying between the rails of track No. 4.
Q. Between the rails of track No. 4?
A. Yes, sir.
Q. Where was his hat, if you observed?
A. Between the rails of track No. 4.
Q. Between the rails of track No. 4?
A. Yes, sir.
Q. Later on did you find a little book that he was using to put the numbers in?
A. Found it in daylight.
Q. Daylight. Where was it?
A. Between the rails of track No. 4.
Q. Between the rails of track No. 4. Is that the book there, as far as you can tell?
A. Yes, sir.

Q. Is that the kind of record that is made?

[fol. 89] A. The checking on those, put them on a train sheet in the office, off of that.

Q. Is that the record that was made on the front page of this when you found it?

A. Yes, sir.

Q. These numbers, then, which appear on this front page, had they represented the numbers of the cars which were in that train on track 5?

A. These nineteen do.

Mr. Polak: Just a minute, please, if the Court please, I object to that question. He may testify to what is on there. He doesn't know whether they represent the cars that were on track 5 or not.

Mr. Hocker: Why not?

Mr. Polak: It is a mere conclusion.

The Court: Unless he checked them up.

Mr. Hocker:

Q. Well, at any rate, this is the book you found there?

A. Yes, sir.

Q. Were you sufficiently familiar with some of the cars which were in that train, having handled them, to know whether some of them were represented in the numbers here?

A. There is a bunch of tank cars here, oil cars.

Q. A bunch of tank cars; there is a bunch of tank cars?

A. He has got them marked "tank."

Q. Those that are marked "tank"?

A. Yes.

Mr. Polak: Indicate by initials.

The Court: They are marked "tank," aren't they?

Mr. Hocker: There are about nineteen here, I think.

Q. Those are cars which were on track 5?

A. Yes, sir.

Q. Do you recognize the car heads in there at all, or can you tell that?

A. I could not tell that.

Mr. Polak: May I see it, Mr. Hocker?

Mr. Hocker: Surely.

[fol. 90] The Court: Box cars and flat cars have different serial numbers.

The Witness: Yes, sir.

Mr. Hocker:

Q. Now, of course, when you pulled the pins and separated these two cars from the drag, the engineer had not control over the two cars that were loosened?

A. No, sir.

Q. Now, is it customary in the operation of making up these freight trains for the engineer to do any whistling in connection with the warning of men who are engaged in working around the yards, such as switchmen and car inspectors, and such as car checkers?

Mr. Polak: That is objected to, if the Court please, on the ground that what their habit or custom may have been would not throw any light on this question; one of the grounds of negligence is that they failed to warn him, that they failed to sound the bell or blow the whistle. Now, what they might have done on all other occasions would not show whether it was negligence or not.

The Court: Well, I assume the question of assumption of risk?

Mr. Hocker: Yes.

The Court: In a case of this kind, the question is what knowledge he had.

Mr. Hocker: The method of doing business, I think, is important; if the Court and jury should conclude under proper instructions that it was negligent method, that is one thing——

Mr. Polak: I will withdraw my objection.

Mr. Hocker: Now, did he answer that question or not?

[fol. 91] Q. You remember the question, do you? Perhaps I better repeat it.

A. I don't remember.

(Thereupon the reporter read the last question.)

A. No, sir.

Mr. Hocker:

Q. Or by ringing of the bell?

A. No, sir.

Q. Is there any custom of that sort in any railroad yard in which you had any contact or experience with?

Mr. Polak: Just a minute, please. Don't answer that until I object to it.

Mr. Hocker: I want to show this is not only a local custom, but is a general custom.

Mr. Polak: I will object to any custom which did not prevail in their yard.

Mr. Hocker: It did prevail in their yard.

Mr. Polak: Especially in view of the fact that the counsel said the basis of the former question was to charge with knowledge.

Mr. Hocker:

Q. Have you worked with other railroads and been around other railroad yards?

A. No, sir—yes, sir; I worked for several.

The Court: I will—I think you better not——

Mr. Hocker: I thought your Honor suggested perhaps I had not laid the proper foundation.

Mr. Hocker:

Q. Have you been around and observed the methods of business in other yards?

Mr. Polak: Just a minute, please, pardon me. I don't think you understood the Court. The Court said you had not shown Mr. Allen had worked in other yards. The Court is not talking about this man.

Mr. Hocker: That is so. I think I may show it has bearing upon the reasonableness and the propriety of this [fol. 92] custom, to show that it was not only a local custom, peculiar to this locality, but it was a general, universal custom among all railroads in the handling of business of this kind.

The Court: Well, so far as showing negligence on the part of this railroad——

Mr. Hocker: Exactly, bears upon both questions.

The Court: I will let him answer.

Mr. Hocker: What is that?

Mr. Polak: I object for the reason that the foundation has not been laid to show that this man ever worked for

any other railroad. He told me that for years, as far back as I went, he never worked on any other railroad but this one.

The Witness: I never made any such statement to you.

Mr. Hocker: I don't think that this colloquy——

Mr. Polak: It is not meant for colloquy. If the witness did not say that I take it back. You either said that here or when your deposition was taken. He had worked for a number of years railroading, except when he was out on strike, and went back for this same railroad, that is what he told me.

The Witness: Yes, sir; but I worked before I worked for this railroad.

Mr. Polak: I am telling what his deposition says.

Mr. Hocker:

Q. Have you been around—I am not particularly concerned whether you worked for other railroads—just have you been around and observed the methods of business of handling cars and operation of engines in other yards in this locality around St. Louis?

A. Yes, sir.

Mr. Polak: What was the answer?

Mr. Hocker: "Yes, sir."

[fol. 93] Mr. Polak: I can't hear the witness.

Mr. Hocker:

Q. Now, is there any different method with reference to the matters I inquired about, the giving of warnings or signals and the soundings of bells and whistles in those yards, and in this yard?

A. No, sir.

The Court:

Q. When men are repairing cars, do they ever repair at night?

A. Only in emergency cases.

Q. What signal do they give then?

A. Men repairing cars?

Q. To men repairing cars, to keep off the track?

A. Well, the man repairing cars hangs a blue light on the car. That indicates workmen working in, under or about that car.

Q. That would be a green flag at daytime or blue light at night?

A. Blue flag in day and blue light at night.

Mr. Hocker:

Q. When a man is working on a car, so that he is bound to be in contact with it, and the signals are put up to warn you to keep away from that?

A. Yes, sir.

Q. One kind of a signal in the daytime and one at night?

A. Yes, sir.

Q. But men who move around the yards, from car to car and track to track, do they look after themselves, and do they give you any warning every time you move around that vicinity?

Mr. Polak: I object to that.

The Court: So far as the man is concerned?

The Witness: May I answer?

The Court:

Q. You may answer.

A. Every man is to look out for his own safety.

[fol. 94] Q. And you have no thought or apprehension at the time you cut these cars off, and when you turn away to go about your business, that Mr. Allen was in any danger from any contact with these cars?

A. No, sir.

Q. Or that he was not protecting himself as he had been accustomed?

A. No, sir.

Mr. Hocker: That is all.

Redirect examination by Mr. Polak:

Q. Mr. Murdock: you are familiar with the rules over there in the yard, aren't you?

A. Yes, sir.

Q. Are you familiar with this little book that they get out—that is their book of rules, isn't it?

A. Yes, sir. Some of them. Not all of them; I cannot quote them word for word.

Q. No, I don't expect you can. I did not mean that, but I mean, you are familiar with the rules in here in regard to the movement of engines and giving signals; things of that sort?

A. Yes, sir.

Q. And when you told counsel that it was not the custom, in moving engines, to sound the bell or blow the whistle, you referred to the rules contained in this, didn't you?

A. Yes, sir.

Q. Now, are you familiar with the rule on page 47, which says, "The engine bell must be rung when an engine is about to move and when approaching and passing public crossings, at grade"?

A. Find rule 24.

Mr. Hocker: I object to that as being utterly immaterial.

The Witness: Find rule 24.

Mr. Polak: Now, Mr. Hocker——

Mr. Hocker: I don't think the jury ought to be misled.

[fol. 95] Mr. Polak: I am not trying to mislead the jury. There is your own rule book. The engine bells must be rung when the engine is about to move and when approaching and passing public crossings at grade. Now, there is nothing there to show that that applies to main-line engines; it says "engines."

Mr. Hocker: This engine was not about to move, this engine was moving.

The Witness: Pardon me, sir——

Mr. Polak: Wait, Mr. Murdock; let the Court rule.

Mr. Hocker: And it was not at a crossing.

The Witness: If you look up rules 24 and 103 it will give you—yard movements—in regard to yard movements.

Mr. Polak:

Q. Well, you are familiar with this rule that I have just read to you, are you?

A. Yes, sir.

Q. Now, what is the one you called my attention to?

A. 24 and 103.

Q. Twenty-four?

A. And 103; yes, sir.

Q. Well, take 24 first. Twenty-four is when cars are pushed by an engine, except when shoving or making up trains in yards a white light must be displayed on the front leading car by night; that don't say anything about it, does it?

A. Yes, sir.

Mr. Hocker: That is with reference to lights.

Mr. Polak:

Q. I did not ask you about lights.

A. Well, 103.

Mr. Polak:

Q. One hundred and three?

A. Yes, sir.

Q. When cars are pushed by an engine, except when shoving or making up trains in yards, a trainman must take a conspicuous place on the front of the leading car?

A. Except when working in a yard.

[fol. 96] Q. Well, I did not ask you about taking a conspicuous position on the car. I asked you about the bell.

Mr. Hocker: Read it, though.

Mr. Polak: All right; all right, I will read it, 103a, if you want me to, but I know what is in this book.

Mr. Polak:

Q. But neither one of those that I have just read refer to anything about ringing a bell; one says a white light shall be on the cars and the other says a man shall take a conspicuous position on a leading car?

A. Except when working in a yard; we were working in a yard.

Q. But that still says there that when an engine is about to be moved a bell must be rung, doesn't it, and when approaching and passing public crossings at grade; isn't that true, rule 30, on page 47?

A. Says nothing pertaining to yard work, though.

Mr. Hocker: What page is that?
Mr. Polak: Page 47.
Mr. Hocker: No, what——
Mr. Polak: No. 30, use of signals.
Mr. Hocker. Where an engine is about to move; now, there is no such situation present here. This engine was moving around there all the time.

Mr. Polak:

Q. He said he knew the rule, that it was not customary to ring the bell or give any warning?
A. No, not in yard work, yard movements.
Q. It don't say so here, does it, Mr. Murdock; it says the engine bell must be rung when the engine is about to move and when approaching and passing public crossings at grade?
A. There were no public crossings.
Q. How?
A. There were no public crossings.
Q. Well, it don't say on public crossings, it says at a public crossing; it says two times.

[fol. 97] Mr. Hocker: It doesn't say while moving; it says about to move. When you start, so you haven't here—one of these situations confronted here, so far as this rule is concerned.

Mr. Polak:

Q. When an engine bell is to be rung, when approaching and passing public crossings at grades.

Mr. Hocker: Read 32.
Mr. Polak: I am asking him about thirty; you can read from any rules you want to.

Q. That rule is in the book, isn't it?
A. Yes, sir.

Mr. Polak: You can ask about that.

Mr. Hocker:

Q. Rule 32 requires as follows, Mr. Murdock, doesn't it, the unnecessary use either of whistles or bell is prohibited?
A. Yes, sir.

Q. Yes. How far was this engine away from Mr. Allen at the time you cut these drags off?

Mr. Polak: Just a minute, Mr. Hocker; I understood you were through. I was asking the witness a few more questions on redirect and then I——

Mr. Polak:

Q. Now, those cinder cars that shot out there, that were kicked out, that you told counsel about; as I understand it, you were cutting them out of the train, or cutting them out so that you could make up the 2:30 train, weren't you?

A. No, sir.

Q. In other words, which business was—which took precedent, getting out the 2:30 train or the local at 7:30 in the morning?

A. Why, the 2:30 train.

Q. And then was the purpose in getting these cars that were only going to local points out of the way so that you could first make up the 2:30 train and then get to work on making up the local?

A. Well, we have to do that work as soon as we could, because we had other work to do.

[fol. 98] Q. But which duties were paramount, which came first, which took precedent, getting the 2:30 train out or the local train?

A. The 2:30 train required short loads out of this local.

Q. Which took precedence, the 2:30 train or the 7:30?

The Court: He answered the 2:30.

Mr. Polak: I did not understand him.

The Court: Yes, he said the 2.30; naturally, that would be the first train out.

Mr. Polak:

Q. Well, were you working in making up this 2:30 train at the time?

A. Yes, sir.

Q. How high are these cars over all, the height; suppose a man were standing along one of those cars, about where would his head come to?

Mr. Hocker: Well, it depends on the man; you mean Mr. Allen?

Mr. Polak:

Q. Well, take a man five feet eight inches high?
A. Well, I presume it would come up a little above that grab iron; about in there.

Mr. Hocker: Where did he say?
Mr. Polak: He said his head would come up a little above the grabiron.

A. This grab iron here.

Mr. Polak:

Q. Will you indicate that on Plaintiff's Exhibit F, about where a man five feet eight would come?
A. This is not exact.
Q. No.
A. It is about.
Q. That is all right. This book, when you found it, you did not return it to Mr. Allen; you turned it in, didn't you?
A. It was along daylight, in the morning, we turned it in to Mr. Baxter, the yard clerk there, and I presume he turned it in to the office.

Mr. Polak: That is all, Mr. Murdock.

[fol. 99] Recross-examination by Mr. Hocker:

Q. I believe you stated this engine was somewhere in the neighborhood of twenty-five car lengths back towards the east some from where you made this cut-off?
A. Yes, sir.
Q. And about one hundred and twenty-five yards further away than that from Mr. Allen at the time you performed this movement?
A. Yes, sir.

Mr. Hocker: That is all.

Mr. Polak:

Q. Could you have hollered at him?
A. If I knew he was in there, in danger.

Mr. Hocker: Just a minute; whether a man could holler, of course, the jury can answer that; I don't believe Murdock could holler very loud.

The Court: Judging from the way he talks.

Mr. Polak: Well, just one more question.

Mr. Polak:

Q. Could you have given a signal to the engineer which would have caused a whistle to be blown?

Mr. Hocker: I object to that for the reasons heretofore stated; the situation does not disclose any legal duty to do any such thing.

The Court: No question in God's green earth; any human being will understand if a man says blow a whistle, he could if he wanted.

Mr. Polak: He was twenty-five car lengths away, your Honor.

Q. I mean is there any signal you would give to cause the engineer to sound his whistle?

Mr. Hocker: He has testified that any signal he would give would have to be relayed by Mr. Allen's son, who was in the middle; that is the way he was handling it.

[fol. 100] The Court:

Q. If you wanted him to signal by whistle, was there a sign to give him?

A. Why, just a whistle signal with the lamp; something similar to that (indicating).

Mr. Hocker:

Q. What is that?

A. Just give a whistle signal.

Q. What was that?

A. Just a lamp.

Q. Juggle it up and down? That is all?

Mr. Polak:

Q. Or you could have given him what you call the wash-out, couldn't you?

A. That would stop him.

Q. And that would give him a signal to blow the whistle, too, wouldn't it?

A. No, sir.

Mr. Polak: All right; that is all, Mr. Murdock.

CHARLES KUNSEMUELLER, of lawful age, was thereupon called as a witness and, being first duly sworn by the clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Polak:

Q. What is your name?

A. Charles Kunsemueller.

Q. You are a city surveyor, in the employ of——

A. Deputy City Surveyor for the Dodge Surveying Company.

Q. Mr. Kunsemueller, you are a surveyor, and have been for how long?

A. Oh, I have been in the game for over thirty years.

Mr. Polak: Will you admit his qualifications?

Mr. Hocker: I think you have sufficiently proven his qualification.

[fol. 101] Mr. Polak:

Q. Did you go with me and with the claim agent for the railroad company and take your surveying gang of men and make some measurements of the Toledo, St. Louis and Western Railroad tracks in or near Madison, Illinois, some time last summer?

A. Yes, sir.

Q. Do you remember the date?

A. July 11th.

Q. I will ask you to state whether or not—well, just state what that is, that plat, I hand you, which I ask the stenographer to mark "Exhibit G."

(Thereupon, the reporter marked the same "Plaintiff's Exhibit G.")

A. That is a drawing showing tracks 3, 4, 5, 6 and 7, in that yard, the yard of the Toledo, St. Louis and Western,

showing distances between tracks, a distance of about four hundred feet apart.

Mr. Hocker:

Q. It is a very small part of the yard, isn't it?
A. Yes, sir.

Mr. Polak:

Q. That is about four hundred feet of the yard, isn't it?
A. Yes, about four hundred feet.
Q. Did George Allen, the son of the plaintiff, accompany us, and in the presence of you and the claim agent of the railroad company, point out the place of the accident?
A. He did.
Q. Does that plat embrace the place of the accident as was pointed out to you?
A. Yes, sir.
Q. Now, will you state, well, I assume that that is the plan which you prescribed from your field notes that you made over there?
A. Yes, sir.
Q. You took those distances, did you, with transit and with tape lines?
A. It was measured with steel tape.
[fol. 102] Q. And are those measurements accurate?
A. Yes, sir.
Q. State then at the place of the accident the distance between track four and track five.
A. Center to center?
Q. Yes.
A. Was eleven feet and ten inches.
Q. Now, then, what would that make the distance from the rail of one track to the rail of the other?
A. I would have to figure that.
Q. If you take four feet eight——
A. Seven feet one and one-half inches between the gauge lines.

Mr. Hocker:

Q. What do you say, gauge lines?
A. The inside of the track.

Mr. Polak:

Q. Now, how much narrower would that be taking into consideration the width of the rail?

A. Four inches.

Q. Four inches?

A. About, I did not measure the rail, at least four inches.

Q. Now, state whether or not, according to the measurements you made, in referring to that plat, whether there is any difference in the distance between track 4 and 5, and between track 3 and 4, right at the same time?

A. There is two and one-half inches.

Q. Which is the narrowest, between 4 and 5 or between 3 and 4?

A. Four and five is the narrowest.

Q. How many inches?

A. Two and one-half inches.

Q. Now, in regard to five and six, state whether or not there is any difference in the width of those tracks?

A. That is two and three-fourths inches wider.

Mr. Hocker:

Q. Which is wider?

A. Between 5 and 6, two and three-fourths wider than between 4 and 5.

[fol. 103] Mr. Polak:

Q. Now, take the distance between track 3 and 4, and go west, and state whether or not the distance between those tracks is narrower or wider?

A. A hundred feet east is about an inch and three-eighths narrower than 3 and 4, and a half inch wider.

Q. I did not understand that.

A. A hundred feet east of the accident.

Q. Is what?

A. Would be, between 4 and 5 is narrower 1⅜ inches than between 3 and 4.

Q. And how much as compared between——

A. Between five and six it is a half inch wider.

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PLAT SHOWING MEASUREMENTS
BETWEEN TRACKS 3,4,5 & 6 & 7.
IN YARDS OF TOLEDO, ST. LOUIS & WEST'N. R R
MADISON, ILLINOIS.

SCALE 1 inch to 20 feet
DOGGE SURVEYING Co.

Mr. Hocker:

Q. Which is wider?
A. The track, where the accident was.
Q. Between four and five is wider than between five and six?
A. Yes, a half inch.

Mr. Polak:

Q. And that is a hundred yards east?
A. A hundred feet.
Q. A hundred feet east, a hundred feet west?
A. No, that is seventy-one feet east; I have continuous measurement, that is, between the point and this.
Q. Then the distance between center and center of those tracks is——

The Court:

Q. Eleven feet ten inches?
A. Eleven feet ten inches.

Mr. Polak: That is all, Mr. Kunsemueller.
Mr. Hocker: That is all.
Mr. Polak: I would like to offer that plat in evidence.
The Court: Any objection?
Mr. Hocker: No objection.

Said plat, marked "Plaintiff's Exhibit G," is in words and figures as follows:

(Here follows exhibit, marked side folio page 103a)

[fol. 104] Hilbert S. Allen, of lawful age, was thereupon called as a witness and, being first duly sworn by the clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Polak:

Q. Will you state your name to the jury?
A. Hilbert S. Allen.

The Court: Speak up, Mr. Allen.

Mr. Polak:

Q. Talk loud, Mr. Allen, so all these gentlemen can hear you, and so the Court can hear you. How old are you, Mr. Allen?

A. Forty-six.

Q. On October 27th, 1922, were you in the employ of the Toledo, St. Louis and Western Railroad Company?

A. Yes, sir.

Q. Did you sustain an accident there in those yards?

A. Yes, sir.

Mr. Hocker: You are not making any point about the receivership; that is the truth of the matter.

Mr. Polak:

Q. Well, who were you employed by, the railroad or the Receiver; do you know whether the railroad was in the hands of a receiver at that time?

A. Yes, sir; I think it was.

Mr. Polak: You are not making any point——

Mr. Hocker: Oh, I did not know; I just wanted to be understood that we are not disproving something we had proven yesterday.

The Court:

Q. It is known as the Clover Leaf, isn't it, Mr. Allen?

A. Yes, sir.

Mr. Polak:

Q. The Clover Leaf, under the operation of Walter L. Ross, the Receiver. Mr. Allen, where were you working at the time, that is, between what tracks?

A. Between 4 and 5.

[fol. 105] Q. And did you say that you did receive an accident at that time?

A. Yes, sir.

Q. What time of day or night was that?

A. I don't remember exactly; about between 1 and 2 o'clock.

Q. Between 1 and 2?

A. Yes, sir.

Q. Now, what time had you gone to work that night?

A. Eleven o'clock.

Q. Where did you report when you went to work?

A. The yardmaster.

Q. At 11 o'clock?

A. Yes, sir.

Q. And who was present there when you reported?

A. I don't remember anyone right then.

Q. Well, when you first started to work, what did you do?

A. Well, we got an order to get a train ready for 2 or 2:30, somewhere along there, and I went out and checked a full train on track 6, about thirty-four cars.

Q. About thirty-four cars?

A. Yes, sir; about that, and then I went in the office and was writing up on the train sheet, and the dispatcher sent in a later order to let that train go out with nineteen cars and pick up at Edwardsville——

Q. Well, you were required then to make a recheck of these cars, were you?

A. Yes, sir.

Q. And is that what you were doing when you were hurt?

A. Yes, sir.

Q. On what track were these cars that you were rechecking?

A. Track 5.

Q. Now, Mr. Allen, how many of those cars were there, if you remember?

A. The order said let them go out with nineteen cars. I had not checked all of them; I do not know how many there were.

[fol. 106] Q. Well, those cars on track 5, at which end of the string did you start to check them, the east end or west end?

A. The west end.

Q. Is that the customary way to check them?

A. Yes, sir.

Q. Now, in checking those cars, tell how you did that, Mr. Allen.

A. I would take the car number and initial, and on sealed cars I would take the seal numbers and notice where they were going to.

Q. Now, where do you have to stand when you are checking those cars, or where did you on this occasion?

A. At the side of the car.

Q. Between what tracks, first, were you standing when this accident happened?

A. Betwen four and five.

Q. Which way would you be facing?

A. Facing south.

Q. Now, in between times when you checked these cars, which way would you look?

A. Look east.

Q. Did you look east before you were hurt?

A. Yes, sir.

Q. Now, when you were struck or hurt, when you sustained this accident, just what were you doing, what way were you looking?

A. I was checking a car.

Q. Well, do you remember what cars you were checking?

A. Some tank cars from the B. T. R. tanks.

Q. B. T. R. tanks?

A. Yes, sir.

Q. By tank you mean cars that contain petroleum or some product of that kind, gasoline, or something like that?

A. Yes, sir.

Q. B. T. R.?

A. Yes, sir.

[fol. 107] Q. Do you remember the destination of those cars, or the car you were checking at the time you were hurt?

A. Toledo.

Q. How do you know that, Mr. Allen?

A. I just remember there were a string of B. T. R. tanks there, and they were marked for Toledo.

Q. How had they marked them for Toledo?

A. Big naught, big O with a check at the end of the car.

Q. O is station Toledo?

A. Yes, sir.

Q. Other cars were marked according to—from a Toledo car, this way, isn't that true?

A. Yes, sir.

Q. And you were facing one of those B. T. R. cars when you were hurt?

A. Yes, sir.

Q. What did you have, a lantern?

A. Yes, sir.

Q. How do you hold your lantern, how did you hold your lantern on that occasion when you were checking these cars?

A. Most generally have the lantern up over my shoulder, setting on my arm like this, and had my left hand——

The Court:

Q. Run your arm through the handle?

A. Yes, sir.

Q. And set the bottom up there?

A. Yes, sir.

Q. And the handle is up around your shoulder, and bent back, and the lantern sets on your arm?

Mr. Polak:

Q. Now, was it a bright night out there in the yard, or how was it; just state the weather conditions.

A. Well, it was just an ordinary night, only the moon was not shining.

Q. But it was along some time, then, between 12 and 1:30, would you say?

A. Yes, sir.

Q. Do you know just about the time you were hurt?

A. Between 1 and 2; I could not state exactly the time.

[fol. 108] Q. Now, how far do you have to stand from the cars in order to get this car number and initial, or get whatever information is necessary for you to put on the pad?

A. I judge something like three feet.

Q. Three feet?

A. Yes, sir.

Q. You mean three feet from the rail?

A. No, sir; from the car.

Q. How far do those cars overhang the rail, about?

A. I judge something like two feet.

Q. Then, you mean that that would put you about five foot from the rail?

A. Yes, sir.

Q. And were you about in that position on the occasion you were injured?

A. Yes, sir.

Q. What was the first you knew of any cars being moved down on track 4?

A. Something hit me and spun me around and knocked me down and run over me.

Q. Where did it hit you, Mr. Allen?

A. I could not tell you.

Q. Do you know just about where on your body?

A. I imagine it hit me on the left side somewhere.

Q. Well, what became of your lantern?

A. I do not know.

Q. Well, what did you do after you were hurt?

A. I crawled over. I thought they might kick some more cars down there, and I crawled over and got outside between those two rails, out on the next track.

Q. What track?

A. Between 3 and 4.

Q. Between 3 and 4, and that would be north of where you were struck?

A. Yes, sir. The reason I got on that side was I—that is all the way I could move; I could push myself over with the left foot and back of the head.

[fol. 109] Q. Was that where you were when the men found you?

A. Yes, sir.

Q. Before these cars hit you was any warning given you of any kind?

A. No, sir.

Mr. Hocker: One moment. I object to that and move that the answer be stricken out. Let him describe what he heard, what happened.

The Court: Yes, describe what you heard.

Mr. Polak:

Q. Tell what you heard, then?

A. I did not hear anything.

Mr. Polak:

Q. Did you hear any engine bell rung?

A. No, sir.

Q. Was any engine bell rung?

A. I never heard it.

Q. Could you have heard it from the distance that they testified it was from where you were hurt if it had been ringing?

A. Yes, sir.

Q. If Mr. Murdock had hollered to you, or Johnny Jack, the other man working there, had hollered to you one hundred or one hundred and twenty yards away, could you have heard them?

Mr. Hocker: One moment. I object to that. I make the same objection with respect to that testimony; there was no legal duty with respect to that, and calling for a conclusion of the witness.

The Court: Well, I will let him answer.

Mr. Hocker: Except.

To which action and ruling of the Court defendant, by counsel, then and there duly objected and excepted and still continues to object and except.

Mr. Polak:

Q. Did you answer it?

The Court: If he knows where they were located.

Mr. Polak: Sir; what did the Court say?

[fol. 110] The Court: You are asking him whether or not he could hear a man yelling one hundred and twenty-five yards away.

Mr. Polak: Where the man was up there at the end of this car.

The Court: He doesn't know where the other man was.

Mr. Polak: I asked him where these men testified they were.

Mr. Polak:

Q. Where Murdock said he was, if he could have heard him if he hollered. Well, I do not insist upon the question; I will withdraw the question.

Mr. Polak:

Q. You said that no bell was rung?

No, sir.

Q. Now, Mr. Murdock testified that he had shot other cars, or kicked other cars down on that track, about fourteen, I believe he said; were you there when he did that?

A. No, sir; I had not got out in the yards, I guess, yet.

Q. When you were working how was track 4?

A. I think it was clear.

Q. Mr. Allen, state what they customarily do in that yard there when engines are moved.

A. Ring the bell.

Q. How long had you been working there?

A. I had been working out in the yards for about a year and a half.

Q. What other warning, it any, do they give you when they are about to send cars down on the track where you are working?

Mr. Hocker: Now, I object to that as stating a conclusion. I think the proper way is to let him describe how [fol. 111] these movements are done, rather than warnings, or one thing or another.

Mr. Polak: I will withdraw that question.

Mr. Polak:

Q. Describe it the way counsel says, Mr. Allen.

A. Well, when I was checking out there the switchmen passed and told me if they was going to kick cars down where I was working; close to where I was working.

Q. What would they say to you, Mr. Allen?

A. They would say, "Got a couple of hot cars for you," or something like that.

The Court: We can't hear. You have got to talk up in the court room.

Mr. Polak:

Q. Talk up loud, Mr. Allen.

A. They would tell me that they had something to do on that train; most generally when I got out to check a train they had it already made up.

Q. The train would be already made up?

A. Yes; most generally.

Q. When you checked?

A. Yes, sir.

Q. But you said a minute ago that when cars were coming down near where you were checking, or close, the men would say they had some hot ones for the next track?

A. Yes, sir; or they had so many they are going to add onto that, or take some off, something like that.

Q. Anything like that—was there anything like that told you on this occasion?

A. No, sir.

Q. Now, state whether or not you had to work fast on this occasion when you were hurt.

Mr. Hocker: Now, one moment. I object to that as a conclusion.

[fol. 112] The Court: The question is, what time; the better way to prove that is what time they had to perform the services required of him.

Mr. Polak: That is what I want him to tell.

The Court: I know; but you are asking him for his conclusion, whether he had to work fast or not; the jury——

Mr. Polak:

Q. About how much time did you have to make this recheck in, Mr. Allen?

A. Well, I had just maybe a little bit more than half the time that I usually had to check these trains.

The Court: That does not answer the question.

Mr. Polak:

Q. Well, how much time would you usually have?

A. About two hours.

Q. How much time did you have on this occasion?

A. I judge about an hour, maybe an hour and fifteen minutes.

Q. And in checking these cars, what was the purpose of checking them as long as you could, if there was such——

A. Had to get the train out a certain time; had to check the cars and pull the bills, and write it up on a train sheet so the conductor could recheck his bills against my check and get ready to leave on time.

Q. Now, state how you held your lantern so that you can get that car number and initial?

A. The bail around my shoulder and the lantern on my left arm.

Q. I mean—I will get you to state, Mr. Allen, whether you can gain any time or not by holding that lantern far enough away to get the car number and initial at a glance; or tell how you do that?

A. I just walk along to the car and hold my lantern up as high as I can, like that.

[fol. 113] Q. What do you see from your lantern?

A. See the number and initial of the car.

Q. By holding the lantern back a little way can you get it any quicker at a glance?

A. I would have to stand back far enough so that I could see the number and initial at the same time, if I am working fast——

Q. If you are working say, how about whether you can stand any nearer the train or not?

A. I suppose you could, one at a time.

Q. Now, in checking this car just before you were hit; can you say how long about you were in that position?

A. I guess something like half a minute.

Q. When you know cars are coming down on the other track, what do you do, if anything, to take care of yourself?

A. Flatten myself up against the cars that I was checking until they would pass.

Q. Do you know about what tracks the different cars are to go down when you go out there checking?

A. No, sir.

Q. Now, when you were there checking this car just before you were struck, state whether or not you moved over towards, nearer to track 4, or whether you maintained the same position all the way or not?

A. No, sir.

Mr. Hocker: I did not understand that answer.

Mr. Polak: He said "No."

Mr. Hocker: It is in the alternative.

Mr. Polak: I did, that is true.

Mr. Polak:

Q. Just tell what you did before you were struck, whether you maintained the same relative position to the car we were checking, or whether you moved around?

A. I was just holding up my lantern checking that car?

[fol. 114] Q. About how long were you in that position before you were struck, if you know?

A. About a half a minute, I guess.

Q. When you came to, now, you were lying somewhere between tracks—well, I will withdraw that. You never were unconscious, were you, Mr. Allen?

A. Unconscious for half a second, right when I was hit.

Q. And when you first regained your senses, what did you see, if anything?

A. I was being drug and rolled under the cars.

Q. Well, could you see what kind of cars they were?

A. Not until they passed over me and I could not see then, for certain; I thought they were coal cars.

Q. Now, you were taken to what hospital?

A. St. Elizabeth's Hospital in Granite City, Illinois.

Q. How long did you stay in that hospital?

A. Eleven weeks and five days.

Q. And what did they do to you there in the hospital, Mr. Allen?

A. They set my—put my arms back in place, the shoulders, set my arms, took off my leg.

Q. State whether or not you sustained any injury to your right hip?

A. I did.

Q. Did you suffer any pain there in and about your shoulders as a result of them being dislocated?

A. Yes, sir.

Q. Now, did you sustain any injury to either arm?

A. The left arm was broken here (indicating).

Q. Did that cause you any pain or suffering?

A. Yes, sir.

Q. Now, what, if you sustained any injuries to the right hip, or the pelvis, do you know about that?

[fol. 115] A. It seems like my right hip was broken right across.

Mr. Hocker: Well, pardon me; I object to that as a conclusion. The physician certainly must know that; he doesn't know about that.

Mr. Polak:

Q. Well, you were examined, weren't you, by the doctors over there in the hospital?

A. Yes, sir.

Q. And Dr. Gray Briggs made X-ray photographs of your injuries, did he not?

A. Yes, sir.

Q. And Dr. Weisman examined you and examined those X-rays?

A. Yes, sir.

Q. Dr. Westerman has made several examinations of you?

A. Yes, sir.

Q. Did you sustain any injuries in and about your hips?

A. Yes, sir; it seems like——

Mr. Hocker: Well, pardon me.

Mr. Polak: I claim his ribs were broken.

Q. Did you suffer any pain about your chest or body?

A. Yes, sir; right about here.

Q. What kind of pain?

A. It seems like my ribs were broken or pulled loose there; I could not tell what.

Q. Well, state whether or not your lungs were affected in any way?

A. I suppose they were; I spit blood for about a month.

Q. Any part of your head hurt?

A. Yes, sir; the back of my head here; and something hit me over this eye, right across there.

Q. Either ear hurt?

A. This left ear hurts.

Q. What is the condition of the ear now?

A. It feels like it is kind of stopped up; kind of a roaring in that ear.

[fol. 116] Q. In your left ear?

A. Yes, sir.

Q. That place at the base of the skull; did that cause you any pain?

A. Yes, sir; it caused me headaches sometimes.

Q. Did you ever have headaches before the accident?

A. No, sir.

Q. Can you hear as well out of your left ear as you could before this accident?

A. Cannot.

Q. Now, did you suffer any pain with your right leg?

A. Yes, sir.

Q. How long did that last, that pain?

A. Suffer with it yet.

Q. You do?

A. Yes, sir.

Q. Can you wear an artificial limb, Mr. Allen; have you tried to wear an artificial limb?

A. Yes, sir.

Q. With what success?

A. Not very good.

Q. Well, go ahead and explain to the jury.

A. I can wear it for a day at the time, and my leg hurts so I have to pull it off. Some days I can't wear it at all. In September there was two weeks when I could not wear it at all.

Q. State whether or not you suffer any pain in that arm now.

A. Yes, sir; at time it gives—hurts me.

Q. Does this condition of your hip or pelvis there hurt you?

A. Yes, sir; it hurts me*n* when I walk, and if I lie down in bed on my right side, or on my back, it hurts.

Q. State whether or not you suffer any mental anxiety as a result of these injuries?

A. Yes, sir.

Q. Mr. Allen, how do you sleep and how has your condition of sleeping been after the accident?

A. Not very good; I can't sleep part of the night.

Q. How was it before the accident?

A. Sleep all right before the accident.

[fol. 117] Q. Do you suffer any loss of appetite as a result of that accident?

A. I did at first.

Q. For how long did that continue?

A. About nine months, I suppose; nine or ten months.

Q. What were you earning over there as a car checker, Mr. Allen?

A. Four dollars and fifty-four cents a day.

Q. What would that run to, about, per month?

A. About $136.00 for a thirty-day month and about $140.00 and something for a thirty-one-day month.

Q. Have you worked any since the accident occurred as a car checker?

A. No, sir.

Q. Have you worked at anything since the accident?

A. No, sir.

Q. How much did your hospital bill cost you over there?

A. I judge that that——

Q. Well, what were you out for the hospital bill over there, Mr. Allen?

A. Thirty-six dollars and sixty cents above what the company paid.

Q. How is that? Explain how that was?

A. After—I think it was on the 22nd of December the company ordered them to put me in a ward, and I asked the difference between the price of the room I was in and a ward, and they told me it would be about $10.00 a month, and I said I would pay that myself and stay in a room.

Q. You did that, did you?

A. Yes, sir.

Q. For three weeks, three weeks and a half?

A. It was from about the 22nd of December until the 17th of January, when I left.

Q. How much are you indebted to Dr. Westerman and Dr. Briggs; you don't know, do you?

A. No, sir.

Mr. Polak: You may examine, Mr. Hocker.

[fol. 118] Cross-examination by Mr. Hocker:

Q. Mr. Allen, you are 46 now?

A. Yes, sir.

Q. Or were you 46 at the time of the accident?

A. Forty-six now.

Q. Forty-six now?

A. Yes, sir.

Q. When were you 46?

A. The 4th of June.

Q. Last year?

A. Yes, sir.

Q. How long have you been in the railroad business, Mr. Allen?

A. I begun working for the Clover Leaf on February 2nd, 1920.

Q. That was over at Madison, was it?

A. Yes, sir.

Q. What had been your business before that, Mr. Allen?
A. Former school teacher.
Q. Formerly a school teacher. Whereabouts?
A. White County, Indiana.
Q. White County, Indiana. You had taught school there, had you?
A. Yes, sir.
Q. How long had you taught school?
A. About eighteen terms.
Q. That means how many years, I would not know?
A. Eighteen—one term term in a year.
Q. Eighteen. That would be eighteen years?
A. Yes, sir.
Q. Whereabouts have you taught?
A. White County, Indiana.
Q. In the towns?
A. Some in the towns and some in the country.
Q. How large a town?
A. Oh, just a small village certified high school.
Q. Where had you gone to school, Mr. Allen?
A. There at the same place.
Q. That was your old home?
A. Yes, sir.
Q. Had you prepared yourself for a teacher, that is, gone [fol. 119] to the—what do you call them, the institution?
A. Normal schools.
Q. The normal schools, or something of that kind?
A. No; I never went to normal school; I had been teaching before that was required.
Q. I see. You were enabled to get your license to teach because of your preparation before that time?
A. Yes. Well, I would have to pass examinations, too.
Q. Well, you did pass examinations?
A. Yes, sir.
Q. Successfully?
A. Yes, sir.
Q. Had no difficulty in getting your position?
A. No.
Q. As far as the examination was concerned. Did you, when you came here to St. Louis, or to Madison, did you go to work for the railroad then?
A. Yes, sir.

Q. You had not done anything here in St. Louis?
A. No, sir.
Q. Other than that?
A. No, sir.
Q. Had you ever done—been in any other business than that of teaching school?
A. Yes, sir.
Q. What business?
A. Clerk in a store.
Q. Clerk in a store?
A. Yes.
Q. Now, the reason I am asking you these questions is simply to ascertain what, if any, effort you made to obtain any other employment, Mr. Allen?
A. No, sir; I did not think I could stand the strain.
Q. You write a good hand—you understand bookkeeping, things of that kind, do you?
A. No, sir; I write a good hand, but I do not understand bookkeeping.
Q. You never taught bookkeeping?
A. No, sir.
Q. Or anything of that kind; have you made any effort [fol. 120] to get a position of that sort?
A. No, sir; I do not feel——
Q. Clerical position?
A. I don't feel like I could stand to work at anything.
Q. Now, where the principal injury that you received, Mr. Allen, was the loss of the right foot or leg, wasn't it?

Mr. Polak: Well, I object to that, if the Court please; that is a matter the jury should decide; not anybody else.

Mr. Hocker:

Q. I don't mean to bite him; all that would be my inference; if Mr. Allen differs with me about it, of course, that is—well, that is the main injury that you received?
A. Yes, sir; my leg and my hip.
Q. Now, whereabouts can you point—where was the leg amputated?
A. Right about here, about five or six inches below the knee.

Q. About five or six inches. And do you recall where it was that the rails of the car went over it, about somewhat lower down?

A. Across my foot near the ankle.

Q. Across near the ankle joint?

A. Yes, sir.

Q. Now, this injury to your hip, was that your right hip?

A. Yes, sir.

Q. Is anybody treating you for that?

A. How?

Q. Is anybody treating you for that?

A. No, sir.

Q. Has there been anybody treating you since you left the hospital?

A. No, sir.

Q. In what way does that bother you or disturb you?

A. It is sore, and when I walk, put my weight on that leg, it hurts in here where it was broken; this round ball of the femur was just pushed up into the hip bone.

[fol. 121] Q. You don't know that yourself?

A. That is, by looking at the X-ray picture, that is all I know about it.

Q. Have you any doctor—has any doctor been treating you since you left the hospital?

A. Yes, sir; I was sick in February.

Q. Well, I did not mean for other ailments, but for your troubles that you received in the accident?

A. No, sir.

Q. Nobody has?

A. No, sir.

Q. Is there any doctor here in court or subpœnaed here in court to testify to this injury, or any thing of that kind?

Mr. Polak: Just a minute. Do you want my answer on that?

Mr. Hocker: Why, yes.

Mr. Polak: He doesn't know who is subpœnaed. Dr. Westerman and Dr. Gray Briggs.

Mr. Hocker: I see. They will know the situation.

Mr. Hocker:

Q. Now, during the last year and a half before that accident you had been working out in the yard at night, hadn't you?

A. Yes, sir.

Q. Were there any other car checkers besides you in that yard?

A. Not on that trip; there was one for the first trip and one for the second, and one for the third.

Q. You mean portions of the day?

A. Yes, sir; eight hours.

Q. Your work began at 11 and ended at——

A. Seven.

Q. Seven. And it was your duty to move around in the yards and check the trains that were being made up, or were made up so that you could prepare the records for [fol. 122] the conductor of the train to take with him on his journey?

A. Yes, sir.

Q. And you would take the seal numbers and the car numbers and the initials?

A. Yes, sir.

Q. Of the cars; now, that, of course, brought you into all parts of the yard, did it not, Mr. Allen?

A. Yes, sir.

Q. You went around through the yards, freely, wherever the necessities of the case might require you to be there, you would go?

A. Yes, sir.

Q. And during all this time I suppose the engine, or if there were more than one engine, would be switching cars around in the yards there?

A. Yes, sir.

Q. During the nighttime?

A. Yes, sir.

Q. And ordinarily they would be switching around fairly close to you, wouldn't they?

A. Ordinarily they would have the train already made up before I would go out to check it.

Q. But you would be checking and they would be making up other trains on other tracks?

A. Hardly ever on that track; they did not get out as many trains on that track as they did on the second, and not as many on the first track as the second.

Q. You knew about this 2:30 train that night?

A. Yes, sir.

Q. You knew all right about the 7:30, or something, train that went out?

A. Yes, sir.

Q. And you knew these men were making up this train on No. 5?

A. Yes, sir.

Q. And you knew they were also engaged in making up the local train?

A. No, sir.

Q. How?

A. No, sir; did not.

[fol. 123] Q. Didn't they do it every night?

A. They had irregular times to make up the local.

Q. Well, you know they would make that up one time or another?

A. Some time before morning; yes, sir.

Q. And if they were not doing that they would be making up some other train or moving cars around from one place to another in the yard?

A. Lots of times they go down to the East St. Louis yards and work and they would work up the westbound, different parts of the yards.

Q. You knew this train was making some movement in the general neighborhood of this yard, did you not, this night?

A. I did not know but what they were through switching.

Q. I say, you knew they were around there, had been around there?

A. Yes, sir.

Q. You knew that they had partially made up this train on track 5 at least?

A. I did not know but what they had it done.

Q. You knew they either had it done or were about finished with it?

A. Yes, sir.

Q. And you knew that this engine and this crew were around in the yard?

A. Yes, sir.
Q. Some place?
A. Knew they were there some place.
Q. Moving around?

Mr. Polak:

Q. That was what, now; I did not understand you; what did you say, Mr. Allen?
A. Yes, I knew they were in the yards.

Mr. Hocker:

Q. And you knew that their duties were liable to take them most any place in the yard, as they moved around, didn't you?
A. Yes, sir.
[fol. 124] Q. You carried a lantern on your work around there?
A. Yes, sir.
Q. All the other men carried lanterns in their work, did they?
A. Yes, sir; after night.
Q. You never saw Mr. Mr. Murdock when he was down towards the lead there?
A. No, sir.
Q. You paid no attention to him?
A. No, sir.
Q. You were quite busy in taking down these numbers, counting the checks?
A. Yes, sir.
Q. Now, as I understand you, you stood about three feet away from the cars?
A. Yes, sir.
Q. So you would be probably standing in track 4?
A. No, sir.
Q. How?
A. No, sir.
Q. How far were you, would you say you were from the rails of track 4?
A. Well, I could not say; I just walked along in the passageway between the two tracks where we always walked to check cars.

Q. Well, how far does the, this car that you were checking, is that one of those tank cars?

A. Yes, sir.

Q. How far was that; did that extend over the rails of track 5?

A. I judge about two feet.

Q. You were about five feet, or about three feet away from the face of that car?

A. Yes, sir.

Q. The side of the car?

A. Yes, sir.

Q. You were not paying, of course, very particular attention to where you were standing; you were standing at a place convenient to take the numbers?

A. Yes, sir.

Q. Do you recognize, Mr. Allen, this card and book as the one you were using that night?

A. It looks like my handwriting; yes, sir.

Q. That is your handwriting?

A. I believe it is.

[fol. 125] Q. And do you recognize, or is your memory sufficiently clear for you to look at those parts, to the kind of cars, and to say whether or not that represents the work you had been doing in the checking of this train?

A. This train was, I don't know, don't know what this is; that is the seal number, isn't it, on somebody else?

Q. I don't know.

A. Added that on my——

Q. Is this column in your handwriting?

A. Yes, sir.

Q. This column to the left?

A. Yes, sir.

Q. Doesn't that look like the same writing?

A. I don't remember that being added on there.

Q. You had a book of rules, I suppose, like everybody else, didn't you?

A. No, sir.

Q. How?

A. No, sir; never saw one.

Q. Never saw a book of rules?

A. I saw the outside of them, but never read them; was not required to.

Q. You do at times wear an artificial foot?
A. Yes, sir.
Q. I gather?
A. Yes, sir.
Q. Having worn it, sometimes it pains you and you take it off?
A. Yes, sir.
Q. And use it at other times?
A. Yes, sir.
Q. When you have that, you are able to walk without the crutches, are you?
A. Yes, sir.
Q. It has only been about a year since this happened?
A. Yes, sir; a little over a year.
Q. A little over a year, October 27th; this is December? Do you find that you are able, as time goes on, to use it a little better than you did earlier?
A. I do not know; I had a worse time of any in September.
[fol. 126] Q. Your arm, I suppose, healed and that is the fracture of the bone in the arm; that is all right now, is it?
A. It pains me at times.
Q. It pains you at times?
A. Yes, sir.
Q. And then your right hip pains you at times?
A. Yes, sir.

Mr. Hocker: I believe that is all.
Mr. Polak: That is all, Mr. Allen.

Recess: At this point 11:45 o'clock a. m., the court took a temporary recess.

Reconvene: At this point, 11:55 o'clock a. m., December 7th, 1923, the court reconvened, and all parties and the jury being present as before, the following proceedings were had?

George H. Allen, of lawful age, was thereupon called as a witness, and being first duly sworn by the clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Polak:

Q. State your name to the jury.
A. George H. Allen.
Q. How old are you, Mr. Allen?
A. Twenty-two.
Q. Are you a son of the plaintiff, Hilbert S. Allen?
A. Yes, sir.
Q. Mr. Allen, on October 27th, 1922, where were you employed?
A. Toledo, St. Louis and Western Railroad.
Q. That is being operated by the Receiver at that time?
A. Walter L. Ross, receiver.
[fol. 127] Q. And what was your job?
A. Switchman.
Q. What were your hours, Mr. Allen, at that time?
A. Twelve o'clock midnight to 8 a. m.
Q. Were you there the night your father was hurt?
A. Yes, sir.
Q. What were you doing on that night?
A. Switching.
Q. Now, in order to save time, I am going to just ask a leading question, just preliminary. Did that switch crew consist of Mr. Daniel, as engineer, and Mr. Moreline, as fireman?
A. Yes, sir.
Q. And Mr. Murdock as switch foreman?
A. Yes, sir.
Q. What was your job?
A. Following the engine, pin puller.
Q. And what was Mr. Johnny Jacks' job?
A. Working the field.
Q. Now, do you remember shortly before that accident a string of cars being pulled up that lead eastwardly before the cars were kicked down on 4?
A. Yes, sir.
Q. About how many cars were in that string?
A. Between twenty and twenty-five cars.
Q. When those cars were past 4 switch, or where track 4 goes into that lead, where were you?
A. I dropped off on the curve at No. 1 switch, over on the main line, to relay signals.

Q. You would be north or south of the train?

A. North.

Q. You would be on the same side Mr. Murdock was on?

A. Yes, sir.

Q. Did Mr. Murdock give a signal before your father was hurt?

No response.

[fol. 128] Q. What was the signal?

A. He give a highball and then a stop sign.

Q. Now, did you relay that to the engineer?

A. Yes, sir.

Q. Both of those signals?

A. Yes, sir.

Q. Did you know where those cars were going?

A. No, sir.

Q. Before or just at the time when the highball and the stop signal was given did the engine bell ring?

A. No, sir.

Q. Was the whistle blown?

A. No, sir.

Q. Now, then, just tell what happened, Mr. Allen.

A. We just backed up the lead with about twenty or twenty-five cars.

Q. You backed up the lead?

A. We backed up the lead with about twenty or twenty-five cars.

Q. By backing up the lead you mean you went east or west?

A. Backed up east.

Q. How is that?

A. We backed up the east, with about twenty or twenty-five cars, and after we got up a certain distance past No. 4 switch, east of it, the foreman give a stop sign; I relayed it to the engineer; the engineer stopped, and then he give a highball; I relayed that to the engineer, answered it, come ahead.

Q. How do you mean, answered it?

A. Well, he started ahead; he got the signal to come ahead.

Q. Then what?

A. He kicked the cars; I give a stop sign.

Q. And were you near where Murdock was when you pulled the pins on those cars?

A. No, I was not very close to him.

Q. Were you between him and the engineer?

A. Yes, sir.

[fol. 129] Q. Then what was the first you knew of any accident?

A. I saw some one, who I supposed to be Murdock, run; I give the engineer a stop sign and went over there.

Q. Where was your father when you found him?

A. Between tracks 3 and 4, with his head lying east.

Q. Now, then, what did you do with him?

A. I just stayed there with him until the foreman went to call for an ambulance.

Q. And to make a long story short, the ambulance came and he was taken to the hospital?

A. Yes, sir.

Q. Did you accompany him to the ambulance?

A. Yes, sir.

Q. In the ambulance to the hospital?

A. Yes, sir.

Q. Mr. Allen, did you step off the distance from 4 switch, that is, where 4 connects with the lead, to the place where you found your father?

A. Yes, sir.

Q. About where you found him?

A. Yes, sir.

Q. When did you do that?

A. That same night.

Q. What was the distance?

A. Two hundred and forty-four ties; I counted the ties down to the accident.

Q. Who was with you when you did that?

A. Francis Leahy.

Q. Do you know where he is now?

A. His father said he is in Chicago.

Q. What was Francis Leahy?

A. He just come out with his father in the ambulance.

Q. His father was in charge of the ambulance, and was an undertaker over there?

A. Yes, sir.

Q. You stepped off that distance, and that was two hundred and forty-four ties; do you know about how many yards that is?

A. About one hundred and twenty-five yards.

[fol. 130] Q. Did you know or find out later what the cars were that were sent down there on track No. 4, that struck him?

A. Well, it was the first from—I knew the cinder cars were on the rear end of the——

Q. Were there any other cinder cars in the yards?

A. Yes; in the cinder pit; there wasn't any other cars on the lead.

Q. So you knew it was cinder cars; were they hopper-bottom cars?

A. No; side-door bottom.

Q. Side-door bottom. I am referring to Plaintiff's Exhibit F; was that the kind of car door?

A. Yes; that type car.

Q. What were the numbers of those two cars, if you know?

A. C-61 and C-602, Toledo, St. Louis and Western.

Q. And did you make any measurements of those cars?

A. Yes, sir.

Q. Who told you to do that?

A. You did.

Q. When did you make those measurements, Mr. Allen?

A. In June.

Q. What did you find the width—which one did you measure, C-602 or C-6——

A. I measured C-602.

Q. Was the other one similar to that car?

A. Yes, sir; similar type.

Q. Now, what did you find to be the width of that car that you have measured?

A. Ten feet wide.

Q. What did you measure it with?

A. Tape.

Q. And you found the width to be ten feet; the width from where to where?

A. The top; across the top.

Q. Across the sill?

A. Across the sill is the same.

Q. Along the sill across the top?

A. Yes.

Q. And you found that to be ten feet?

A. Yes, sir.

[fol. 131] Q. Did you measure the length of the car?

A. Yes, sir.

Q. How long was it?

A. Thirty-six feet from one sill to the end of the sill outside.

Q. Did you measure the grab irons on that car?

A. Yes, sir; they were four inches and a quarter.

Q. Four inches and a quarter; you mean by that that they stuck out four inches and a quarter?

A. Yes; four inches and a quarter from the side of the car.

Q. What size iron were they?

A. About five-eighths inch.

Q. Mr. Allen, tell whether or — it *it* is customary, in moving engines in that yard, to ring a bell.

Mr. Hocker: One moment, now; I object to that as leading and suggestive. Let him tell how they operated.

The Court: Yes.

Mr. Polak: I will withdraw the question.

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Mr. Polak:

Q. In moving engines, tell how they are operated and what is done in the yards there.

A. Well, the engineer, when he moves the engine, anyone working around close, he rings the bell.

Q. How is that?

The Court:

Q. Will you talk louder?

(Thereupon the reporter read the order.)

Mr. Polak:

Q. Was any bell rung on this occasion?

A. No.

Mr. Hocker: Now, I object to that because, according to the conditions under which he rings, the engineer would not ring the bell because, as far as he knew, there was nobody around there close; this engineer was away off, and

the signals had to be relayed through him to the engineer. [fol. 132] The Court: Well, I will let it stand.

To which action and ruling of the Court defendant, by counsel, then and there duly objected and excepted and still continues to object and except.

Mr. Polak:

Q. Mr. Allen, when car checkers are checking cars between those tracks, and the cars are about to be sent down there, tell what, if anything, is done.

A. Why, if you are close enough to them, you can say "We got some hot cars for you," or "We are going to kick some cars down that way"; make them be on the lookout.

Q. Do you tell them what you are going to do?

Mr. Hocker: Don't lead him.

Mr. Polak:

Q. At all, Mr. Allen?

A. Yes, sir; we usually do.

Q. Mr. Allen, I will hand you a time table which is marked "Walter L. Ross, Receiver, Toledo, St. Louis and Western, Time Table 33," and ask you if that is the time table that they used over there?

A. Yes, sir.

Q. Where did you get that?

A. From the trainmaster.

The Court: Don't drop your voice because you are close together, because this is not a private conversation; the jurors have got to hear it; if you want them to hear it, speak up. I am supposed to hear it.

Mr. Polak: Mark this "Plaintiff's Exhibit H."

(Thereupon, the reporter marked the same "Plaintiff's Exhibit H.")

Mr. Polak:

Q. Mr. Allen, I will also hand you another time table, [fol. 133] which has printed on it, "Walter L. Ross, Receiver, Toledo, St. Louis and Western Railroad, Clover

Leaf Route, 34," which I will ask the stenographer to mark "Plaintiff's Exhibit I."

(Thereupon, the reporter marked the same "Plaintiff's Exhibit I.")

A. Yes, sir; that is the time table.

Mr. Hocker: What is the purpose?

The Court: What is the purpose, to show 2:15 or 2:30?

Mr. Polak: No, sir; I have got to show the cars mentioned were engaged in interstate commerce, they were destined outside the state; he has testified to that.

Mr. Hocker: Mr. Allen has testified to that.

The Court: Mr. Murdock said they were making up that particular train for Indiana and Ohio points.

Mr. Hocker: And I shall offer no evidence to the contrary, your Honor.

Mr. Polak: I want to show the "O" means Toledo.

Mr. Hocker: Mr. Allen testified to that and I will concede to it.

Mr. Polak: I will say, your Honor, in introducing all these things, I first took this matter up——

The Court: Don't let's have any argument. Go ahead with the case.

Mr. Polak: They would not admit anything; I did not know what they would admit. You may examine, Mr. Hocker.

Cross-examination by Mr. Hocker:

Q. Mr. Allen, you are 22, you say?

A. Yes, sir.

Q. And you are the son of the plaintiff?

A. Yes, sir.

[fol. 134] Q. Mr. Allen, how long have you worked there in that yard?

A. I worked there, commenced there in December, 1920.

Q. About the same time your father did?

A. No, after.

Q. He began to work first and then you went to work later as a switchman?

A. Yes, sir.

Q. Now, your hours of duty were about the same, too, you went on at 12 o'clock?

A. Twelve o'clock midnight to 8 a. m.

Q. And you worked around in those yards there during the same time of night that he did?

A. Yes, sir.

Q. And this was the crew and that was the engine that was used in making up these various trains that your father would check?

A. Yes, sir.

Q. As the car checker, and when did you begin making up any trains that night?

A. Just as soon as we went to work.

Q. That was shortly after 12 o'clock?

A. Yes, sir.

Q. And the first thing you did was to set your cars in on track 5?

A. Yes, sir.

Q. You had about how many on track 5?

A. There was nothing on track 5 that I know of.

Q. I mean, when you got through setting them in, how many did you set in?

A. About eighteen or twenty cars of oil.

Q. Eighteen or twenty cars of oil, and was that about all that was to go on that track, or were there any more?

A. That was all excepting some hot cars.

Q. Hot, h-o-t?

A. One hot car, I think.

Q. What is a hot car?

A. Perishable.

Q. That is what you call a hot car?

A. Yes, sir.

[fol. 135] Q. If it is perishable, it is a hot car?

The Court: Some of them are hotter than others.

Mr. Hocker:

Q. I suppose you use coal cars for perishables?

A. No, sir.

Q. Well, you had a car of hides to Edwardsville mentioned here; had that been put on?

A. No, sir.

Q. That was yet to be put on?

A. When we went to work that was on the west end of track number 9.

Q. Well, you had not put that on to track 5?

A. No, sir.

Q. So that that movement had to be made on track 5. In the meantime, while making up this train you were also setting cars out, having in mind the making up of the local freight that was going out in the morning, didn't you?

A. Yes, sir.

Q. So you were doing these two things together so that when you got your train that went out at 2:30, around there, made up, you would also have part of your work done for the local?

A. Yes, sir.

Q. So you were moving all freight in that west end of the yard there, weren't you?

A. Yes, sir.

Q. Yes. Now, you say if you were going by and happened to see a car inspector or a car checker, and you were going to move in close to him, you would tell him about it?

A. Yes, sir.

Q. If you were not near him, you would not do it?

A. No, sir.

Q. And if the engineer saw somebody in his way he would blow his whistle or ring his bell?

A. Yes, sir.

Q. But movements like this, the engineer was away off twenty-five cars away, wasn't he?

A. Yes, sir; he was about twenty-five cars up the lead.

[fol. 136] Q. He could not see what was going on down where you and Murdock were, could he?

A. No, sir.

Q. And nobody could see anyone down there, nor you could not see from where you were, could you?

A. All I saw was two lanterns down there.

Q. Did you see your father's lantern?

A Yes.

Q. You saw Murdock's lantern?

A. Yes.

Q. And you saw your father's lantern?

A. Yes.

Q. But you paid no particular attention to that?

A. I knew he was down there.

Q. I say, you knew he was down there, you had seen the lantern there practically every night since you had been at work there?

A. Yes, sir.

Q. And you thought nothing about it when you saw your father's lantern there, did you?

A. I knew it was there.

Q. I say, you paid no attention to it, it did not mean anything to you?

A. I was looking out for it.

Q. I say, it did not mean anything to you, you went on about your business?

A. I had to, I was in a position that I had to ride back.

Q. I say, it did not occur to you anything was about to strike him or anything of that sort?

A. I knew he was in a close place.

Q. You knew he was down there checking that train?

A. I knew he was down there checking that train.

Q. Did you know where the two cars were going, the cinder cars?

A. No, sir.

Q. You did not know where they were going; you knew they were going to be put some place down there?

A. Just knew he was going to switch the local and put a [fol. 137] hot car on that train, that is all I knew.

Q. Where were you going to get this hot car you were going to put on?

A Before we went they had, we went to pull the Alton Southern main line, that put us down at the west end of the line, that hot car, it was there on nine, we pulled the cinder cars one around the other, pulled that other car, backed up by the lead with it.

Q. You had not done all that before this movement of, or after these cars had been started down on track 4, these two cars?

A. Sure, we had put——

Q. You done that after that?

A. No, before.

Q. Before, I see. Now, did you notice where these two cars, how far east they were of where your father lay when you went down there?

A. No, they were quite a distance, about one hundred or one hundred and twenty-five yards.

Mr. Polak: Mr. Hocker, did you mean east or west?

Mr. Hocker:

Q. West of them.
A. West.
Q. They had gone past where he was?
A. They had gone past the place of the accident.
Q. So there was nothing on track 5, or where he was lying at that time? On 4, I mean.
A. No, they done passed over.
Q. You still are employed over there in the yards, are you?
A. Yes, sir.
Q. In the same crew?
A. No, a different crew now.
Q. But the same work?
A. Yes.
Q. What is the name of the railroad that is running that now, that is operating those yards?
A. Nickel Plate.
[fol. 138] Q. Nickel Plate; how long have they been running it?
A. Since approximately March.
Q. Since about March; the New York, Chicago and St. Louis Railway?
A. Yes, sir.
Q. Is that the proper name that they have been running it, since about March, since that time the Clover Leaf or the Toledo—St. Louis, Toledo and Western had nothing to do with it, the operation of it?

Mr. Polak: Just a minute, if the Court please. I think that is a matter peculiarly within the knowledge of the defendant and that is of record.

Mr. Hocker: I am trying to prove it by him, if he knows it; I don't want to have to bother to do it otherwise; that is the company he worked for and that is the company that runs the yard over there.

Mr. Polak: I object to it, because his testimony would not be the best evidence.

Mr. Hocker: Why, what a man says who he works for is the best evidence in the world.

The Court: You can ask him for whom he works.

Mr. Hocker:

Q. You have been working for what they call the Nickel Plate, the New York Chicago & St. Louis Railway, since March, haven't you?

A. Yes.

Q. Haven't you been receiving your pay from them?

A. Yes, sir.

Q. You received no pay from the St. Louis, Toledo and Western since that time?

A. No.

Mr. Hocker: That is all.

Mr Polak: That is all, Mr. Allen.

[fol. 139] Mr. Polak: Now, if the Court please, I would like to read in evidence the deposition of Dr. Harlan. I did not subpœna him; did you? I could not subpœna him; he lives in Madison.

Mr. Hocker: Well, he will be here, but he is not here now, if you want to read it.

Mr. Polak: I would like to read it.

Mr. Hocker: I did not want to have him waiting around; doctors don't do that usually.

Mr. Polak: I will now read the deposition of Dr. L. C. Harlan:

L. C. Harlan, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith:

Direct examination by Mr. Polak:

Q. Will you state your name?

A. L. C. Harlan.

Q. You are a physician and surgeon?

A. Yes.

Q. You reside in Madison?

A. Madison, Illinois.

Q. You resided in Madison on October 27, 1922, did you?

A. I did, and long before that time.

Q. You were practicing a good while before that?
A. Yes.
Q. Of what schools are you a graduate?
A. Barnes Hospital, 1907.
Q. Do you know the plaintiff in this case?
A. Yes.
Q. Do you expect to be present at the trial of the case [fol. 140] now set for December 5th in the City of St. Louis?
A. If the company requests me to I will be.
Q. Are you in the company's employ now?
A. Yes.
Q. Were you on the date of this accident?
A. Yes.
Q. When did you first see Hilbert Stuart Allen after his injury?
A. The day of the accident in Granite City, Illinois.
Q. Do you remember the day of the accident?
A. Not without looking at my record.
Q. That was October 27th, 1922; you say that you saw him that night, I believe, of the accident, which occurred about 1 o'clock at night or somewhere in that neighborhood; did you see him that night?
A. Without looking up my record I think that would be about right.
Q. When you saw him, do you remember what were his injuries?
A. Well, he had his—I did not look up my record. I cannot state definitely. If you give me the reports I can tell.

Mr. Finley: I expect to *him* them, doctor.

The Witness (consulting report): His right leg was cut off at the upper portion of the lower third, complete fracture to the middle third of the left humerus, dislocation to the right shoulder, numerous bruises and abrasions to the face and head and over the body. That is as far as the diagnosis of the case goes.
Q. As I understand you, you say that the leg was cut off?
A. Practically off. It was hanging. The foot was hanging and I nipped it off with scissors.
[fol. 141] Q. Then what did you do?
A. I think we treated him for shock for a few hours and then done amputation a little later.

Q. Was the foot off the lower third, you say?

A. Yes, just above the ankle.

Q. Now, then, where was the amputation made; how far above that?

A. The amputation was made on the upper portion of the middle third, about this point.

Q. How far below the knee would it be?

A. About six inches.

Q. About six inches below the knee?

A. Yes.

Q. Will you describe that amputation?

A. What do you mean?

Q. I mean did you first shear off the flesh and then cut the bone?

A. The patient was taken to the operating room and anesthetized. Do you want me to go into detail?

Q. Yes.

A. When I stuck a knife in his leg and all of that?

Q. Yes.

A. I never did it before and I have testified a hundred times in court. I do not think it would have any bearing on the case.

Q. Doctor, I do not want you to go into the exact details, but just tell me what you did, the amputation generally?

A. The amputation was made on the upper portion of the middle third.

Q. What do you mean by amputation?

A. We cut the flesh, you understand; just cut the flesh back from the bone and then saw the bone off.

[fol. 142] Q. After sawing the bone what did you do?

A. Tied the blood vessels and closed the wound and put dressing on and then put the patient back in bed.

Q. That is what you did?

A. Yes; also 1,500 of antitetanus serum. The dislocations were reduced and the fractures adjusted and X-ray pictures were taken to prove the position of the bones; showed that they were all right.

Q. Well, doctor, then, after cutting through the flesh and sawing off the bone then you took the flap—I mean on this occasion you took the flap and turned that back; then, what did you do; did you stitch it?

A. I brought the flap over the end of the bone and sewed the muscles together and sewed the skin together and inserted drainage tubes in there.

Q. All of these methods you have described were done on this occasion?

A. Absolutely.

Q. Do you know how long he stayed in the hospital?

A. I cannot state exactly. I do not recall at this time without looking up my records. I do not know.

Q. This amputation—you considered that necessary?

A. Absolutely.

Mr. Finley: That is all."

Signature waived.

Mr. Polak: If the Court please, I offer in evidence certain excerpts which I will give the stenographer of the report of the Receiver, Walter L. Ross, to the Interstate Commerce Commission for the year ended December 31, 1922. [fol. 143] Mr. Polak: I want to read the title on page 1: "Annual Report of Walter L. Ross, Receiver, Toledo, St. Louis and Western Railroad Company to the Interstate Commerce Commission for the year ended December 31, 1922." On page 2, on page 93, the certificate on page 93, which seems to be question 523, the certificate and the oath and verification. "State of Ohio, County of Lucas," and so forth, showing W. L. Ross makes oath and says that he is Receiver, "Walter L. Ross, Receiver of Toledo, St. Louis and Western Railroad Company; that he has carefully examined the foregoing report and he believes the statements contained in the said report are true; that the said report is a complete and correct statement of affairs of the above named respondent and operations of the property during the period of time from and including January 1st, 1922, to and including December 31st, 1922. (Signed) W. L. Ross. Subscribed and sworn to before me, a notary in and for the state and county above named, the 30th day of March, 1923. My commission expires June 27th." And somebody Wilson, notary, whose name I can't read.

On page 3, topic 101, authority of respondent Walter L. Ross, Receiver, Toledo, St. Louis and Western Railroad Company, " Date of organization, July 9th, 1900. Operating under Receiver since October 23rd, 1914." And on page 18, topic 211-E, which is headed "Equipment, Installations, Betterments, and Retirements Made During the

Year," and column D, which shows, showing the gross amount charge to additions and betterments, steam locomotives and so forth, total $563,567.88. Less equipment re- [fol. 144] tired $295,844.97, showing a balance in favor of betterments of $267,722.91. On page 72, topic 513. Ties laid in replacement and in betterment. Without reading the actual number of ties, showing that they were valued at, cost $288,165.08; and on the same page, topic 514, ties laid in additional tracks, new lines and extensions, showing 3,714 ties at a cost of $5,170.72; on page 74, topic 515, rails laid in replacement and betterments showing 9307, #913,-000.00, which I presume means tons, at $372,130.15. On page 75, under topic 516——

Mr. Hocker: Not objecting for that reason, but don't you think you have got enough in for your purpose?

Mr. Polak: Well——

Mr. Hocker: That is more than the amount you sue for.

Mr. Polak: Well, I will just put in a few more thousands. Rails laid in additional tracks, new lines and extensions, showing 158 tons, at a cost of $4,553.11.

Mr. Polak: Now, you admit that decree discharging the receiver?

Mr. Hocker: Yes.

Mr. Polak: Now, I next offer certified copy by the Clerk of the District Court of the United States for the Northern District of Ohio, a document which is headed: "W. L. Ross, Receiver, Toledo, St. Louis and Western Railroad Company. Consolidated Account. General Balance Sheet [fol. 145] December 31st, 1922." An item shown, item 602, on said report, which shows credit balance transferred from income, 1922, $1,146,782.76, showing a total credit— well, headed, "Profit and Loss Account December 31st, 1922," showing a total credit of $7,141,528.91, and a credit balance carried to balance sheet, $6,998,887.14.

(Thereupon the reporter marked said report "Plaintiff's Exhibit K.")

Said Plaintiff's Exhibit K is in words and figures as follows:

(Here follows exhibit, marked side folio page 145a)

PLAINTIFF'S EXHIBIT K

[fol. 145a]

W. L. Ross, Receiver Toledo, St. Louis & Western Railroad Company

General Balance Sheet—December 31, 1922

Consolidated Account

Assets

Investment:			
701. Investment in Road & Equipment			$42,592,913.41
Investment to June 30, 1907		$39,149,494.27	
Road	$34,923,214.91		
Equipment	3,226,279.36		
Investment since June 30, 1907		4,443,419.14	
Road	2,045,848.07		
Equipment	2,397,571.07		
705. Miscellaneous Physical Property			225.00
706. Investment in Affiliated Companies			1,234,401.00
A. Stocks		714,001.00	
5,872 shares Toledo Term. R. R	1.00		
7,140 shares D. & T. S. L. R. R	714,000.00		
B. Bonds		426,600.00	
416 D. & T. S. L. R. R. 1st Mort. 4%	353,600.00		
73 Tol. Term. R. R. 1st Mort. 4½%	73,000.00		
D. Advances		93,800.00	
Certificates of Indebtedness—Tol. Term. R. R			
707. Other Investments			1,500.00
A. Stocks		1,000.00	
5 shares 1st Inf. Armory Assn	500.00		
50 shares Citizens Telephone Co	500.00		
E. Miscellaneous		500.00	
Membership St. Louis Merchants Exchange	150.00		
Membership Inverness Club	350.00		
Total			$43,329,039.41
Current Assets			
708. Cash		$3,302,823.72	
Treasurer at Toledo	$2,946,241.37		
Cash in Transit	356,582.35		
711. Special Deposits		343,450.83	
Central Ill. Pub. Serv. Co	394.36		
Farmers Loan & Trust Company	600.00		
Columbia Trust Company	180,990.00		
U. S. Govt. Loan	161,466.47		
712. Loans & Bills Receivable		15,000.00	
713 Traffic & Car Serv. Bal. Rec		510,142.33	
714. Net Balances due from Agents & Conductors		135,095.07	
715. Miscellaneous Accounts Rec		248,665.93	
716. Materials & Supplies		662,082.13	
717. Interest & Dividends Receivable		38,652.50	
719. Other Current Assets		345,350.50	
Total			5,601,263.01
Deferred Assets			
720. Working Fund Advances		$1,425.24	
722. Other Deferred Assets		4,630,316.80	
Total			4,631,742.04
Unadjusted Debits			
727. Other Unadjusted Debits		$447,892.36	
728. Securities Issued or Assumed:			
426.6 shares TSTL&W Pfd. Stock	$42,660.00		

Liabilities

Stock:			
751. Capital Stock			$19,952,770.00
Common Stock Book Liab	$10,000,000.00		
Common Stock held in Treasury	4,570.00		
Common Stock Outstanding		$9,995,430.00	
Preferred Stock Book Liab	$10,000,000.00		
Preferred Stock held in Treasury	42,660.00		
Preferred Stock Outstanding		9,957,340.00	
Total			19,952,770.00
Long-Term Debt			
755. Fund Debt Unmatured			17,745,400.00
Prior Lien 3½% Bonds Book Liab	$10,000,000.00		
Prior Lien 3½% Bonds held in Treasury	425,000.00		
Prior Lien 3½% Bonds Outstanding		$9,575,000.00	
1st Mort. 4% Bonds all outstanding		6,500,000.00	
Freight Car Equip. Notes 1920		1,024,400.00	
U. S. Govt. Loan Notes—Trans. Act 1920—Series 1921		646,000.00	
Total			17,745,400.00
756. Receiver's Certificates of Indebtedness, Series A, 1921		$692,000.00	
Less held in Treasury		692,000.00	
Current Liabilities			
758. Loans & Bills Payable		$260,000.00	
760. Audited Accts. & Wages Payable		775,367.04	
761. Miscellaneous Accounts Payable		1,221,757.49	
762. Interest Matured and Unpaid		180,990.00	
766. Unmatured Interest Accrued		158,419.55	
768. Other Current Liabilities		152,359.79	
Total			2,748,893.87
Deferred Liabilities			
770. Other Deferred Liabilities			4,601,700.61
Unadjusted Credits			
771. Tax Liability		$548,794.23	
773. Insurance & Casualty Reserves		63,275.31	
776. Accrued Depreciation		1,234,985.38	
778. Other Unadjusted Credits		504,007.40	
Total			2,351,062.32
Corporate Surplus			
779. Additions to property through income Surplus		$17,222.88	
782. Miscellaneous Fund Reserves:			
Reserve for Guaranteed Advances to Toledo Terminal R. R		93,800.00	
Total Appropriated Surplus		$111,022.88	
784. Profit and Loss Credit Balance		6,998,887.14	

719. Other Current Assets		[illegible]	
Total			5,601,263.01
Deferred Assets			
720. Working Fund Advances		$1,425.24	
722. Other Deferred Assets		4,630,316.80	
Total			4,631,742.04
Unadjusted Debits			
727. Other Unadjusted Debits		$447,892.36	
728. Securities Issued or Assumed:			
426.6 shares TSTL&W Pfd. Stock	$42,660.00		
43.7 shares TSTL&W common stock	4,570.00		
425 TSTL&W Prior Lien Bonds	425,000.00		
729. Receiver's Certificate of Indebtedness:			
Series A—1921	692,000.00		
			447,692.36
Grand Total			$54,509,736.82

773. Insurance & Casualty Reserves		
776. Accrued Depreciation	1,234,985.38	
778. Other Unadjusted Credits	504,007.40	
Total		2,351,062.32
Corporate Surplus		
779. Additions to property through income Surplus	$17,222.88	
782. Miscellaneous Fund Reserves:		
Reserve for Guaranteed Advances to Toledo Terminal R. R	93,800.00	
Total Appropriated Surplus	$111,022.88	
784. Profit and Loss Credit Balance	6,998,887.14	
Total Corporate Surplus		7,109,910.02
		$54,509,736.82

[fol. 146] PLAINTIFF'S EXHIBIT K—Continued

Consolidated Account

W. L. Ross, Receiver Toledo, St. Louis & Western Railroad Company

Details of General Balance Sheet at December 31, 1922

713. Traffic & Car Service Balances Receivable:

Interline Freight Account	$741,984.16
Interline Ticket Account	6,350.77
Car Interchange Account	225,491.06
	$510,142.33

715. Miscellaneous Accounts Receivable:

Audited Bills	$181,082.46
U. S. Post Office Department	10,941.81
Claim Authorities Receivable	653.79
Arbitrary Interline Claims Receivable	42,677.14
American Railway Express Company	12,953.05
Western Union Telegraph Company	357.68
	$248,665.93

716. Materials and Supplies:

General Stores Department	$298,165.10
Fuel Stock	28,989.12
Roadway & Structures Department	85,071.64
Mechanical Department	32,458.04
Tie Stock	34,023.61
Rail Stock	176,706.07
Stationery Stock	6,668.55
	$662,082.13

717. Interest & Dividends Receivable:

Interest on D. & T. S. L. Bonds	.....
Interest on Toledo Terminal Bonds	$547.50
Interest on Loans & Bills Receivable	23,825.00
Dividend on D. & T. S. L. Stock	14,280.00
	$38,652.50

719. Other Current Assets:

Interline Forwarded Advance Unsettled	$345,350.50

720. Working Fund Advances:

Central Freight Association	$144.50
Toledo Sub-Committee Commission on Car Service	90.00
American Assn. of Railroad Superintendents	40.00
E. St. Louis Relay Passenger Station Assn.	600.00
Official Classification Committee	50.74
F. M. Thompson, Chief Claim Agent	300.00
D. F. Milne, Supt.	100.00
D. W. Cross, Supt. M. P. & E	100.00
	$1,425.24

[fol. 147] 722. Other Deferred Assets:

U. S. Govt. Cash, December 31, 1917	$1,148,124.11
U. S. Govt. Material & Supplies, Dec. 31, 1917	670,721.10
U. S. Govt. Agents and Conductors Balances, Dec. 31, '17	59,657.64
U. S. Govt. Working Fund Advances, Dec. 31, 1917	3,026.57
U. S. Govt. Assets, Dec. 31, 1917, collected	1,081,400.25
U. S. Govt. Accrued Depreciation	372,119.84
U. S. Govt. Equipment Retired	92,540.90
U. S. Govt. Road Retired	9,815.63
U. S. R. R. A. Standard Return from Federal Control	1,192,910.76
	$4,630,316.80

727. Other Unadjusted Debits:

Freight Claim Agents Relief Account	$85,530.26
Petty Claim Account	4,060.23
Freight Claim Suspense Account	8,977.24
Operation Silverwood Gravel Pit	14.20
U. S. Govt. Transportation Act 1920 Guaranty	238,877.82
Estimated Interline Freight Unsettled	70,000.00
Foreign Interline Ticket Earnings	1,781.00
Estimated Delayed Per Diem Reports	35,000.00
Material Suspense	3,451.61
	$447,692.36

December 31, 1922

758. Loans and Bills Payable:

U. S. R. A. Demand Note dated 2-3-19—6%	$200,000.00
U. S. R. A. Demand Note dated 3-27-19—6%	60,000.00
	$260,000.00

760. Audited Accounts and Wages Payable:

Audited Vouchers	$476,963.98
Pay Roll Account	298,403.06
	$775,367.04

761. Miscellaneous Accounts Payable:

Agents Drafts	$378,408.62
Freight Claim Drafts	1,535.05
Ticket Refund Drafts	31.82
Car Repair Drafts	17,954.55
Expense Account Drafts	3,458.13
Claim Authorities Payable	2,136.18
Arbitrary Interline Claims Payable	26,233.14

Compensation, Tracy, Chapman & Welles, Attorneys	624,000.00
Compensation, W. L. Ross, Receiver	96,000.00
Compensation, Brown, Geddes, Schmettau & Williams	72,000.00
	$1,221,757.49

[fol. 148] 762. Interest Matured Unpaid:

Coupon Interest Prior Lien Bonds	
Series 17	17.50
24	35.00
29	17.50
30	17.50
31	17.50
32	17.50
33	17.50
34	35.00
36	17.50
37	840.00
38	752.50
39	770.00
40	752.50
41	752.50
42	752.50
43	700.00
44	1,715.00
45	126,350.00
Coupon Interest 1st Mortgage Bonds	
Series 1	20.00
17	20.00
23	20.00
26	20.00
28	20.00
29	180.00
30	40.00
31	160.00
32	40.00
33	40.00
34	40.00
35	60.00

Coupon Interest 1st Mortgage Bonds Series 36	60.00
37	60.00
38	80.00
39	40.00
40	200.00
41	40.00
42	140.00
43	1,100.00
44	3,820.00
Registered Interest—Prior Lien Bonds	41,212.50
	$180,990.00

December 31, 1922

766. Unmatured Interest Accrued:

Interest on Prior Lien Bonds	.....
Interest on First Mortgage Bonds	$65,000.00
Interest on Loans and Bills Payable	60,403.55
Interest on Freight Car Equipment Notes, Series 1920	28,171.00
Interest on U. S. Govt. Loan Notes, Series 1921	4,845.00
	$158,419.55

768. Other Current Liabilities:

Interline Forwarded Prepay Unsettled	$85,467.93
U. S. Govt. Federal Assets Collected	66,891.86
	$152,359.79

[fol. 149] 770. Other Deferred Liabilities:

U. S. Govt. Corporate Transactions	$315,197.50
U. S. Govt. Revenue Prior to Jan. 1, 1918	217,484.38
U. S. Govt. Expenses Prior to Jan. 1, 1918	347,797.38
U. S. Govt. Liabilities, Dec. 31 1917—Paid	2,330,863.48

U. S. Govt. Investment in Road	419,603.19
U. S. Govt. Investment in Equipment	86,968.79
U. S. Govt. Agents & Conductors Balances, Fed.	93,047.68
U. S. Govt. Federal Materials and Supplies	786,046.96
Industrial Track Advances	4,691.25
	$4,601,700.61

778. Other Unadjusted Credits:

Freight Overcharge Reserve	$108,041.46
Reserve for Loss and Damage Claims	85,000.00
Estimated Delayed Accounts Payable	55,086.53
Sundry Accounts	2,628.14
Transportation Department	3,371.97
Suspense Account	249,404.30
Fire Insurance Reserve	475.00
	$504,007.40

W. L. Ross, Receiver

Toledo, St. Louis & Western Railroad Company

Profit and Loss Account to December 31, 1922

Credits

601.	Credit Balance	$3,848,401.39
602.	Credit Balance Transferred from Income 1922	1,146,782.76
603B.	Profit on Road and Equipment Sold—Equipment	19,183.52
606.	Donations	67.66
607.	Miscellaneous Credits	2,127,093.58
		$7,141,528.91

Debits.

615.	Surplus Appropriated for Inv. in Physical Property	$67.66
619A.	Loss on Road Retired	4,485.54
619B.	Loss on Equipment Retired	13,471.45
621.	Miscellaneous Debits	124,617.12
	Credit Balance Carried to Balance Sheet	6,998,887.14
		$7,141,528.91

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify the foregoing to be a true copy of the Account of Walter L. Ross, Receiver, for period ending December 31, 1922, filed in the above-entitled cause in said Court, and that the same is correctly copied from the original now on file in my office.

Witness my official signature and the seal of said Court at Toledo, in said District, this 9th day of November, A. D. 1923, and in the 148th year of the Independence of the United States of America.

B. C. Miller, Clerk, by Brandon Schnorl, Deputy Clerk. (Seal.)

[fol. 150] JOHN JACK, of lawful age, was thereupon called as a witness and, being first duly sworn by the clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination, by Mr. Polak:

Q. Will you state your name to the jury?
A. John Jack.
Q. Mr. Jack, where are you employed?
A. Nickel Plate Railroad.
Q. The what?
A. Nickel Plate Railroad.
Q. Where were you employed on the——

The Court: Well, this is the same gentleman that was referred to by Mr. Murdock and George Allen as having been one of the parties to the crew on the date that Mr. Allen was injured that night?

The Witness: Yes, sir.

Mr. Hocker: Switchman in the field, riding the field.

Mr. Polak:

Q. You were on the same end of the train that Murdock was?

A. Yes, sir.

Q. Well, he was the pin puller and what was your job, field man?

A. Field; yes, sir.

Q. When those cars were both up that lead, just before they were kicked down there, Mr. Jack, where were you riding on the train; at the east end of the train or the west end?

A. I was on the west end.

Q. Now, how close did that train go to where Mr. Allen was working, if you know; pass him on your way east?

Mr. Hocker: If he knows where Mr. Allen was.

Mr. Polak:

Q. If you know.

A. Well, within forty-five or fifty foot; something like that, I should judge.

[fol. 151] Q. Do you mean by that he was forty-five or fifty feet north of you when you passed up that way?

A. Yes, sir.

Q. Could you see his lantern there?

A. No, sir.

Q. How did you know he was there?

A. I should judge just from the way it happened, the way it turned out, that he was hurt there on that track.

Q. And that you passed within about forty to fifty feet from him?

A. Yes, sir.

Q. When you got up there into number 4 switch, and Mr. Murdock gave the signals to come ahead and then stop and pull the pins, where were you?

A. I was at number 4 switch.
Q. Well, where were you, on the north or south side?
A. I was on the south side of the train.
Q. You were on the south side?
A. Yes, sir.
Q. You could not see Mr. Allen, then, could you?
A. No, sir.
Q. Which way were you looking?
A. I was watching the cars.
Q. You were looking up towards the cars on your track?
A. Yes, sir.
Q. Was the engine bell rung before those cars were kicked down there?
A. No, sir.
Q. Was any warning given to this man, as far as you know?

Mr. Hocker: I object to that as calling for a conclusion.

Mr. Polak:

Q. Well, what was done, if anything, just before you kicked the cars down?
A. Well, we came up the lead between twenty and twenty-five cars and Mr. Murdock gave a stop signal as soon as he got sufficiently over number 4 switch to kick [fol. 152] them in there, gave a stop signal and then a kick signal, and he got them going as fast as he wanted them to go, and he cut them off and give a stop signal.
Q. Well, those cars, do they move along noiselessly or not?
A. Well, most generally, now, when they are going down a rail they make a noise.
Q. What kind of a noise do you mean, a clicking?
A. A click, where they hit the ends of each connection, and sometimes the bottom rods on a car will rattle.
Q. They don't make much noise, do they, Mr. Jack, when they are coasting by themselves?
A. Well, a man within one or two car lengths ought to be able to hear them; I most generally do.
Q. A man within one or two car lengths away?
A. Yes, sir.
Q. But a man further away than that, you don't think he would hear them?

A. Well, sometimes.

Q. Now, was the night dark on that occasion?

A. Starlight.

Q. There was no moon shining?

A. No, sir.

Q. Are those yards lighted up in any way?

A. Down around the office they are, but not up in the yards.

Q. Not up in the east yards?

A. No, sir.

Q. Was he hurt in the east yards?

A. He was hurt up in the eastbound.

Q. Up in the eastbound?

A. Yes, sir.

Q. You say up in the eastbound yards?

A. Yes, sir.

Q. Did you know what track those cars were going down on, Mr. Jack?

A. Yes, sir.

Q. You knew what track they were going down on?

A. Yes, sir.

[fol. 153] Q. Just before they were kicked did you see a man working down there between 4 and 5 with a lantern?

A. No, sir; I never noticed.

Q. You never noticed; you were looking back the other way?

A. I was watching the cars and switch.

Q. If you had looked down that way, could you have seen him?

A. No, sir; I could not.

Q. Why not?

A. On account of the cars on No. 5 being so close to the lead.

Q. On account of what?

A. The cars being up; if he had been away at the end of the cars on No. 4, I could have saw him, but if he was down at the end of the cars, I could not see him.

Q. Well, could you have seen his lantern, if you looked?

A. If he had been at the end of the cars.

Q. Did you go down there with these other fellows when you heard somebody was hurt?

A. Yes, sir.

Q. And who was there when you got there?

A. Mr. Murdock and I went down together; Mr. Murdock was just ahead of me.

Q. And where was Mr. Allen at that time?

A. He was laying between Nos. 3 and 4 tracks when we got there.

Q. Where was his pad or his checking book, there, if you know?

A. In the center of No. 4 track.

Q. In the center of No. 4 track?

A. Yes, sir.

Q. Did you see his lantern, or do you remember about that?

A. Well, I never paid any attention at the time, but when we went to pick it up it was laying between No. 4 track.

Q. Between the rails of No. 4 track?

A. Yes, sir; his hat and his lantern and his pad and his pencil.

Mr. Hocker:

Q. Between the rails of No. 4 track?

A. Between the rails; yes, sir.

[fol. 154] Mr. Polak:

Q. Well, did you throw the switch that these cars were shot down there, on track 4?

A. Yes, sir.

Q. In throwing that switch, your cars that were going down there were east of that switch, weren't they?

A. Yes, sir.

Q. How far east of you were they when you threw the switch?

A. Well, I should judge all the way from thirty-five to forty yards.

Q. Now, standing, what is the—is there a switch stand there that you throw the switch by?

A. There is a small switch stand.

Q. One of those small ones?

A. Yes, sir.

Q. You threw that switch, and what way were you facing when you threw that switch?

A. Facing the north.

Q. Facing the north. You knew those cars were going down on track 4?

A. Yes, sir.

Q. Did you look down first to see if track 4 was clear, before throwing that switch to send them on 4?

A. I knew track 4 was supposed to have some cars in.

Q. Some cars in?

A. Because we just put them back in there.

Q. Well, did you send these two cinder cars down there—throw the switch to send these two cinder cars—without looking west to see what was down there on the track where you were sending them?

A. I don't just exactly remember whether I glanced down there or not.

Q. Don't remember whether you did or not?

A. No, sir.

Q. If you had glanced down there from the position you were in, when you threw that switch, could you have seen [fol. 155] Mr. Allen if he had been working alongside of those cars on track 5?

Mr. Hocker: I object to that as calling for a conclusion, not requiring any such acts on his part.

Mr. Polak: I don't know what cars might have been in the way.

The Court: Ask him whether there was anything.

Mr. Polak:

Q. Was there anything between you and Mr. Allen?

A. Well, if he had been down between track 4 and 5 far enough so that track No. 4 cars, the cars on track No. 4 could have hidden him from view, I could not have seen him.

Q. But if there had been cars on track 4 standing far enough so as to hide him from view, would you have thrown the switch and sent other cars down track 4?

Mr. Hocker: Now, one moment. I object to that.

Mr. Polak:

Q. What I want to know is whether you looked down that way before throwing that switch?

A. I don't just exactly remember whether I looked down there or not.

Q. Was there anything to interfere with your view down that way?

A. Nothing but——

Q. Were you in direct line, was there any curve in the track from where you were to where Mr. Allen was hurt?

A. Naturally, there is a small curve where it leads, for the lead, all tracks have a small curve to them where they lead off the lead.

Q. Well, but looking from track 4 on down there, looking from the switch where 4 runs into the lead, which would be up about here, there is no curve from where you were down here to where he was hurt, is there; no curve there, is there?

[fol. 156] A. There is a small curve right here where it comes off the lead, but it is a small curve.

Q. Where is the switch drag or switch stand; that is about here?

A. Well, the switch stand, right about here; yes, sir.

Q. And along this track, wouldn't it be?

A. Between this track and the lead?

Q. Between that track and the lead, right where that track and the lead go together?

A. No, sir; your switch stands are on this side of the lead.

Q. All right. On which side of the switch stand were you, north or south side?

A. I was on the south side of the switch stand; have to have the switch stand between my feet, like this, so as I can get the switch and throw it over.

Q. You could look down track 4 from where you were turning the cars.

A. I could look down if I looked out; I would not have seen nothing only those few cars we kicked back in there.

Q. And they were far enough away so that the cars being sent down there would not bump into them, weren't they?

A. No, sir.

Q. Well, did you look to see?

A. Yes, sir.

Q. You did look down?

A. I know they was in the clear, two cars, because I watched them when they went back in, if we kick them in far.

Q. You watched what?

A. I watched the cars we kicked back in there.

Q. You watched them go down there?

A. I watched them go in the clear.

Q. Did you see them hit Mr. Allen?

A. No.

Q. What cars are you referring to?

A. The cars we put in 4 first.

Q. Before that?

A. Yes.

[fol. 157] Q. How long was that before he was hurt, about?

A. Let's see—put them in there—it must have been about three-quarters of an hour to an hour, I should judge.

Q. That was three-quarters of an hour before he was hurt you looked down there before those cars——

A. Yes.

Q. You did not see him there?

A. No, I never noticed.

Q. As a matter of fact he was not there when those other cars were kicked down, as far as you know?

A. Not as far as I know, he was was not.

Mr. Polak: That is all, Mr. Jack.

Cross-examination by Mr. Hocker:

Q. When did you see Mr. Allen, I think I understood you to say you had seen him?

A. Sir?

Q. When did you last see Mr. Allen?

The Court: I don't think he ever saw him.

A. I don't believe we ever saw him after we left the office.

Mr. Hocker:

Q. I got an erroneous impression.

The Court: He said he saw him and he knew he was hurt down there.

Mr. Hocker:

Q. You said something about going by 50 or 60 feet away from him?

A. I said that was about how far from where he was, from where he was hurt, but whether he was there at the time, I don't know, I never saw him.

Q. Were you further east from Murdock or further west?

A. I was further west than Murdock.

Q. When this cut was made, when these two cars were cut?

A. Yes, sir.

[fol. 158] Q. You were up clearing the switch?

A. Yes, sir.

Q. Yes. I see. Then you went on and attended to the business that you were about?

A. Yes, sir.

Q. And until you heard something from someone else you knew nothing about anyone being hurt?

A. No, sir.

Q. Well, now, in operating this yard, in doing these movements that you are required to do there, you get around all over the yard, I suppose, don't you?

A. Yes, sir.

Q. And these car inspectors and car checkers, they get around all over the yards?

A. Yes, sir.

Q. Now, do you have any system of signal by bell or whistle or anything with reference to this movement around in the yards, or do they look out for themselves?

A. They look out for themselves.

Q. Do you undertake, when you are shooting a car into a track to see whether there is a car checker down there?

A. No; no, sir.

Q. And is that the way the business is transacted there?

A. Yes, sir.

Q. The car checker is around with his lantern?

A. Yes, sir.

Q. And attending to his duties, and you put your cars wherever it is necessary to put them?

A. Yes, sir.

Q. And he is supposed to look out and see the cars as they come along?

A. Yes, sir.

Mr. Polak: Just a minute. I ask that that answer be stricken out, and ask that this witness' testimony as to what the car checker is supposed to do——

The Court: It calls for a conclusion.

[fol. 159] Mr. Hocker: I am trying to get him to tell the way the business is transacted.

Mr. Hocker:

Q. This engine was about twenty-five car lengths away?
A. Yes, sir; between twenty and twenty-five.
Q. From where you were?
A. Yes, sir.
Q. Or from where Mr. Murdock was?
A. Yes, sir.
Q. And that much further away from where Mr. Allen was. You never did see him at the time of the accident or anything?
A. No, sir.
Q. And don't know where he was?
A. No, sir.
Q. Or how he happened to get hit?
A. No, sir.
Q. But you knew—how long had you been working there?
A. I had been working there about two years.
Q. And most of that time Mr. Allen was car checker around there?
A. As far as I can remember; yes, sir.
Q. As far back as you can remember. And he was out in the yard every night going around and checking cars?
A. Yes, sir.
Q. While you were making up trains?
A. Yes, sir.
Q. And you had been moving around this particular part of the yard all that evening since you started to work?
A. Well, most of it.
Q. Around that locality?
A. Yes, sir.
Q. You set these cars in track four and made up the train on track five?
A. Yes, sir.

Q. Then you were moving around cars on eight and three and all around there, weren't you?
A. Yes, sir.

Mr. Hocker: That is all.

Recess: At this point, 12:42 o'clock p. m., the court took [fol. 160] a recess until 2 o'clock p. m. of the same day.

Reconvene: December 7th, 1923, 2 o'clock p. m.

At this point and at the hour hereinabove set out, court was duly reconvened, and all parties and the jury being present as before, the following proceedings were had:

Joseph J. Murdock, of lawful age, having been heretofore duly sworn by the clerk, was thereupon called to the witness stand and testified on further direct examination as follows:

Questions by Mr. Polak:

Q. I don't remember whether I asked you, there was a man riding that lead of cars that went down there or not, was there?
A. Nobody riding the cars; no, sir.
Q. Were those cars lighted; did they have a light on them?
A. No, sir.

Mr. Polak: That is all.

Dr. Gray Briggs, of lawful age, was thereupon called as a witness and, being first duly sworn by the clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Polak:

Q. Doctor, will you please state your name to the jury?
A. Gray Briggs.
[fol. 161] Q. Doctor, what is your profession?

A. X-ray specialist.

Q. Are you a physician and surgeon, doctor?

A. Yes, sir.

Q. Of what schools are you a graduate?

A. Here in St. Louis.

Q. You are an X-ray specialist and have been for how long, doctor?

A. I have been since 1912.

Q. Doctor, did you make any examination of Hilbert Stuart Allen, the plaintiff in this case, some time last summer?

A. I did.

Q. Do you remember when that was, doctor?

A. The 22nd of May.

Q. The 22nd of last May; did you take X-rays of different part of his body?

A. I did.

Q. What X-rays did you take, doctor?

A. The examination covered the chest and ribs on the left side.

Q. The chest and the ribs on the left side.

A. The ribs on the right side, the left shoulder, the left arm, pelvis, both hips, part of the lumbar spine and the skull.

Q. Now, doctor, let's just take them in the inverse order that you have named them; the X-ray of the skull, state whether or not that showed any fracture?

A. There was no evidence of fracture of the field of the skull.

Q. Now, in examining Mr. Allen, did you get a history of his case from him?

A. I don't think so, not mu*st* of one, if any.

Q. Did he tell you what his symptoms were?

A. Well, he may have said something about it, but he certainly did not go into much detail.

Q. Well, in regard to that X-ray, that shows no fracture of the skull, I believe?

A. So that I can——

[fol. 162] Q. I say, I believe you stated it showed no fracture of the skull.

A. No; I don't say that; it shows no fracture of the field of the skull, of the upper part.

Q. Now, doctor, assuming that a man was injured by being struck by some cars on the 27th of October, 1922, and that he was in the hospital for eleven weeks, and that he sustained numerous injuries, including an injury of some kind to the head, and that that caused him to be partly deaf in his left ear; that he spit blood for a considerable time after he was injured, and that he at the present time has lost his hearing to some extent in that ear, and that he hears a roaring in it; state whether or not, in your opinion, those symptoms, what those symptoms would indicate?

A. They might indicate a fracture of the base of the skull in the region of the left templar bone.

Q The left templar bone; where is that, doctor?

A. That extends from about an inch and a half anterior to the pin of the ear, to the mastoid process of the bone back of the ear, there might have been a fracture somewhere through the lower part of that bone, those fractures do not always show in the X-ray.

Q. Now, then, doctor, the X-ray you took of the arm, have you got that X-ray there?

A. Yes; I have several of the arm.

Q. Which arm was that, doctor?

A. The left.

Q. What does that show?

A. It shows a fracture of the arm bone, the humerus, about the middle third. At the time this X-ray was made the fracture was pretty well united, and the alignment was fairly satisfactory; there was one sharp joint of bone on [fol. 163] the back of the arm that projected downward toward the elbow more or less like a rooster's spur, a toothpick, stuck out into the soft tissue, but the alignment was fairly satisfactory.

Q Now, is that the X-ray you have there?

A This is two of the arm.

Q. I see. Can you indicate to the jury where that shows a fracture?

A. I will have to get down for this (indicating). There is where the bone is broken; in the field I indicate, the little spur of bone that sticks out in the soft tissue can be seen there at that point.

Q. The X-ray that you took of the thor—of the upper part of the body, doctor, and the ribs, do they show negative as to fractures?

A. Yes; there was no evidence of fracture of the ribs, no evidence of a fracture of the collar bone or the shoulder blade; that was all negative.

Q. That was all negative. Now, you took, I believe, an X-ray of the pelvis?

A. Yes.

Q. Have you got that here, doctor?

A. In the picture of the pelvis the thigh bone, the femur has been jammed through the hip bone, the ilium, so the ilium has had, or is fractured with the head of the thigh bone driven into it. The femur on the injured side, the right side, is now considerably elevated, and you will notice in the picture a great amount of excess bone tissue, callous.

Q. That is at the right side of the pelvis, is it?

A. That is on the right side.

Q. Doctor, now, does that bone—what do you call that, is that the femur?

A. The femur, yes.

Q. The femur fits into the socket in the pelvis, does it not?

A Yes, it makes a ball and socket joint.

[fol. 164] Q. Now, the socket joint, is that what you call the innominate bone?

A No; the innominate bone is the whole side, it embraces three separate bones.

Q. Was there any fracture of the innominate bone, the innominate joint as shown?

A. Yes, there has been a comminuted fracture of the innominate bone; it has been splintered.

Q. What do you mean by a comminuted fracture, doctor?

A. One where there has been a splintering of the bone.

Q Will you please explain to the jury from that X-ray photograph you have of the pelvis, what that shows as to whether the pelvis is normal or not?

A. No; the pelvis is not normal, it is somewhat lopsided, the hip on the right side is elevated and the hip bone, of course, is greatly deformed as a result of this fracture.

Q. Doctor, from your experience as a physician and surgeon, state whether or not that condition of the pelvis and of the hip bone would limit the use of that hip joint?

A. Yes, it would.

Q. Assuming that you took that photograph at the time you did, and you found the condition that you have just explained, state whether or not that condition will be permanent, or whether, in your opinion, that condition may be permanent?

A. Yes, in my opinion it will be permanent.

Q. Would it cause any pain, doctor, in walking?

A. Probably would.

Q. Would it cause him any pain when he is standing up on his leg?

A. Well, that is pretty hard to say; I presume it would tire him easily at any rate.

Q. Now, doctor, do you know what the position of the [fol. 165] right kneecap was; could you tell from the photograph that you took?

A. No; the pictures do not go that far down.

Q. But state whether or not the right kneecap would have changed its relative position as compared with that photograph that you have there and the change in the hip joint?

A. There is certainly a possibility that such a thing would result on account of the excessive overgrowth of bone which you are getting just above the hip joint itself, exposed spaces filled with excess bone.

Q. Now, you are referring to photograph what, now, doctor?

A. Of the right hip.

Q. How many X-rays did you take, doctor?

A. I have seven views.

Q. Doctor, state what would be a reasonable bill for the services that you performed in taking these photographs.

Mr. Hocker: Wait a minute; your Honor, please——

The Court: Any charge in the evidence?

Mr. Polak: Yes, sir.

Mr. Hocker: I don't understand that the doctor has stated he took these for the purpose of treatment. Now, the purpose of being used in evidence would not be entitled to charge us with that.

Mr. Polak: I say that as a result of such injuries he was compelled to incur and obligate himself for different things, such as surgical service, X-ray photographs and medicines.

The Court: Find out whether or not they were taken——

Mr. Polak:

Q. Well, doctor, state whether those photographs were taken for the purpose of testifying as a witness, or for the [fol. 166] purpose of aiding him in recovering.

A. Well, my belief is that they were made for the purpose of court testimony.

Q. That was your understanding?

A. That was my understanding, yes.

Q. Well, you made the examination, then, last summer?

A. Yes, sir.

Q. Now, doctor, the above injuries that you have testified to, state whether or not, in your opinion, they could cause nervousness?

A. Yes, they could.

Mr. Polak: I believe that is all, doctor.

Cross-examination by Mr. Hocker:

Q. These pictures were taken in May, I believe you said, doctor?

A. Yes, sir.

Q. Last May; so these fractures that you found there, have the bones united, as shown by the radiograms?

A. Yes, they are partially united; there is still a little more process to go on.

Q. Well, that was taken only a few months after, some six or seven months after the accident; at this time they are probably united, wouldn't you say?

A. I presume they are; they should be.

Q. You have seen the man here in the court room?

A. Yes, sir.

Q. He looks well nourished and healthy, as far as his general appearance is concerned; you would expect a natural response of nature, wouldn't you, to the injuries here?

A. Yes, I believe that they are healed up now.

Q. This little point, the bone on the arm, the tendency of nature would be to absorb that, cause it to disappear, wouldn't it?

A. Yes, in time that would probably round off some. I [fol. 167] believe there would be an irregularity there

for a number of years, but in time that should be pretty well rounded off.

Q. You would not recommend any operation to remove that?

A. Not unless——

Q. Unless it caused him some future difficulty?

A. To the nerves or——

Q. How much limited motion is——

Mr. Polak: I can't hear your question.

Mr. Hocker: I guess you are right. I will get back.

Mr. Hocker:

Q. To what extent is the movement of his leg interfered with by the injury to the right——

A. I should say from the—basing an opinion purely on what one sees here, that abduction of the leg, that is, bringing the leg out laterally from the body, would be very much interfered with on account of the great amount of excess bone which has been throw out at the side of that fracture; as far as the forward and backward motion is concerned, there would probably be little there, but not to such great extent, that is, that is what I should say from this.

Q. You have made no observation of the patient himself?

A. No; no examination of him other than an X-ray examination.

Q. No. Your examination was only to do those things necessary to take these photographs. That is all.

Redirect examination by Mr. Polak:

Q. Doctor, when you stated about the broken bones healing, state whether or not that abnormal condition of his hip and his pelvis, whether that will ever change any. [fol. 168] A. No, the elevation of the hip on the right side is a fixed thing; that is not going to change; it does not make any difference how much the bone is healed, and all those excessive calluses are going to be permanent, that is, in a large part; there may be some of it absorbed, but the main part of it is going to stay.

Q. Now, doctor, the limitation of the lateral movement of the leg which you have just testified to, state whether or not that would be permanent or not?

A. Yes; that certainly would be permanent.

Q. And the forward movement?

A. Probably be interfered with permanently.

Mr. Polak: That is all, doctor.

Recross-examination by Mr. Hocker:

Q. Is that the same leg of which the foot was taken——

A. Same side.

Q. You haven't any pictures of that foot——

Mr. Polak: It was——

Mr. Hocker: It was the same foot?

Mr. Polak: The right leg.

Mr. Hocker:

Q. The right side?

A. The right side; yes.

Mr. Hocker: That is all.

Mr. Polak: That is all, doctor.

Mr. Polak: Before Dr. Westerman goes on the stand, I would like to introduce these X-Ray photographs in evidence. One marked "19659 H. S. Allen, 19656-52223," and the other is marked "H. S. Allen, 19659-52223." Well the first purports to be an X-ray photograph of the upper part of the body and ribs, and the second one is of the hip bone, [fol. 169] the small one, marked the same number as above, and the third one is an X-ray photograph of the pelvis, and both hip joints and the junction of the sacroiliac, and also one showing, marked "number 659, H. S. Allen, May 22nd, 1923"—seem to be two different pictures of the upper arm, an X-ray photograph of the skull, same number, same date, same name, and another X-ray photograph seems to be a lateral view of the skull, marked "H. S. Allen, 19659, May 22nd, 1923."

Said pictures are in words and figures as follows:

(By stipulation of the parties hereto said original X-ray photographs have been omitted from the printed record,

and in lieu thereof the said originals have been filed with the clerk of this court for the inspection of the Court.)

See Supplement Abstract.

C. M. WESTERMAN, of lawful age, was thereupon called as a witness and, being first duly sworn by the clerk to tell the truth the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Polak:

Q. Doctor, will you state your name to the jury?
A. C. M. Westerman.
Q. What is your profession?
A. Physician and surgeon.
Q. How long have you been a physician and surgeon, doctor?
A. Seventeen years.
Q. Are you practicing now in the City of St. Louis?
A. Yes, sir.
Q. Of what schools or colleges are you a graduate?
A. Graduate of Barnes University, 1906.
[fol. 170] Q. A little louder.
A. Barnes University, 1906.
Q. Doctor, did you do any special work in regard to amputations; have you had any special experience in that line?
A. Well, I have had the same line that any surgeon would have in civil life, coupled with the fact that I was in France for two years.
Q. You were in France, and in two years time, I will get you to state whether or not you had occasion to set many bones or amputate legs, and so forth??
A. Well, I had the Argonne and St. Mihiel drives; I was a member of Officer Vocational Hospital No. 10, which was the closest vocational hospital to the front line, and that is where all the operating was done, from war casualties.
Q. State whether or not, while engaged as you have just stated, that you have had a great experience with men who had lost arms and legs, and so forth?
A. Yes, you have great——

Q. Did you have occasion to watch them and see the result of how they got along afterwards?

A. We did not see, follow the case afterwards, because we never kept a case in a vocational hospital longer than twenty-four hours.

Q. And then where were they sent?

A. They were sent out of the line and eventually wind up at base hospitals.

Q. Now, doctor, did you make an examination of Mr. Allen, the plaintiff in this case?

A. Yes, sir.

Q. When did you do that, doctor?

A. I have made several examinations during the past month.

Q. When was the first one that you remember?

A. I don't remember the exact date; it is within the past thirty days.

[fol. 171] Q. You have made several examinations of him?

A. Yes, sir.

Q. Now, doctor, did you examine the X-ray photographs that were taken by Dr. Briggs?

A. I did.

Q. And did you make additional photographs of your own?

A. I did.

Q. Referring to one of the X-ray photographs Dr. Briggs has exhibited here in evidence, which shows the condition of the pelvis, doctor, will you state to the jury what condition you found there?

A. It presents evidence of a comminuted fracture of the right iliac bone.

Q. State whether or not it shows any abnormal condition of the hip joints?

A. It does.

Q. Well, doctor, will you just explain to the jury what condition it shows there as to the alignment of the two upper joints, or as to their relative positions?

A. The light should be very clear; here is a normal hip joint, here is the head of the femur, perfectly round, almost like a ball, fits into this, as you see, a socket; this, the rim, the outer rim of the socket; it fits in; there is a perfectly

normal joint and here is the injured joint, with that socket partially destroyed; that is evident without any explanation.

Q. Doctor, is that ball and socket the joint where the leg articulates in the joint?

A. Yes, sir; where the femur, this bone right here, fits into this bone here (indicating).

Q. And if that ball which fits into the socket is not round like it is in the left leg, state whether or not that will interfere in any way with his walking?

A. Absolutely; you can see that this part here is practically an ankylosis; in other words, a new bone formation has frozen this joint.

[fol. 172] Q. You mean by that that it is almost like there is no joint there, doctor?

A. The joint is practically obliterated.

Q. I mean, the meaning of the word "ankylosed."

A. Ankylosed; yes.

Q. Now, doctor, continue. Take an X-ray photograph of the stump?

A. Yes, sir.

Q. Have you got that with you? Now, doctor, explain to the jury what that shows.

A. This is a stump of the left leg which was amputated at the upper part of the middle third.

Q. And I assume there that the dark parts of the bone and the light matter there——

A. If you want me to explain it——

Q. I wish you would, doctor.

A. Here is the knee joint, right here; here is where the tibia, and this is the fibula; this is the small bone in the leg, and this is what you call your shin bone, ordinarily; this view is taken anterior-posterior, or lateral; taken through this way; this was taken this way (indicating).

Q. From the front?

A. Anterior-posterior; this shadow here is soft structures; that is the bone, or foot, and muscle and skin.

Q. The tisues?

A. Soft tissue; this is the bony structure. You will see that the soft structures come down to this point here, swings around; forms a very good pad for the end of his fibula, the small bone, but there is no padding underneath

the tibia; nothing protecting the end of this bone here except just the skin; that is very thin.

Q. Now, doctor, in attempting to wear an artificial leg on that limb, what effect, if any, will that condition that you have just described have on it?

[fol. 173] A. That makes it hypersensitive at the end of the stump here; there is not sufficient padding there.

Q. By hypersensitive do you mean that it is painful?

A. More painful than it should be; more painful than normal.

Q. Doctor, that condition there; state whether or not in your opinion that is permanent.

A. Oh, that is permanent, unless you take another amputation and cut part of this bone here away and bring all this padding around down under that.

Q. All right, doctor, sit down, now, please. Now, what other X-rays—anything more you want to explain about that, doctor?

A. Nothing, except this lack of padding on the end of the tibia.

Q. On the end of the tibia or fibula, which?

A. Tibia; this is the fibula (indicating).

Q. The tibia is small?

A. This is your outside bone, shin bone, in other words; an artificial limb practically rests on the end of that bone, and there is no padding between that bone and his artificial limb; you can imagine how sensitive that would be.

Mr. Hocker:

Q. May I interrupt while you have the pictures there? Looking at the left picture, it seems to show more padding.

A. If you will pardon me, you are looking anterior-posterior, and you are looking at a portion of this bone here; you are catching—when you are looking that way you are catching from here to there; do you see what I mean? From here—in this picture here, you are getting right from there to there, on that picture; this picture here——if you come up close, I will show you—the skin here comes right to this point, right here; there is your outside portion of your skin; let me have that arm picture Dr. Briggs took; [fol. 174] here is a picture that was taken last week of his left arm; the left humerus shows a diagonal fracture at

the upper third, that is united, and which has fairly good apposition; there is some deformity; you can see a slight crookedness, but there is an excessive amount of periosteum right along in here.

Mr. Polak:

Q. Now, by that you mean——

A. The bone covering.

Q. The bone covering?

A. The membrane that covers the bone; there is quite a bit of call-us thrown out here, with several sharp spurs. I want to show you that picture and show you in comparison with one that I think was taken, I believe it was taken last summer; some time last spring.

Q. Yes, sir; some time last May or June.

A. And so that that periosteum, in place of subsiding, is increasing; there is more periosteal thickening in the plate taken last week than there is in the plate that was taken last spring.

Q. And what effect will that have on the use of that arm, doctor?

A. Well, that causes—to begin with, it is a painful arm, and it will impair the function because the muscles and tendons can't—there is too much adhesion in there; they can't freely slide over that bone or anyways near it.

Q. Well, doctor, is this condition of periostitis as you have stated there, is that a disease of some kind, or an affliction that gets into the covering of the bone, or is it like the enamel on a tooth?

A. That is a very hard question to answer, Mr. Polak; whenever you get an irritation of the periosteum, in a case of this sort, you are more or less susceptible; one of the [fol. 175] things that you are susceptible to would be tuberculosis of the bone, because you have a bony structure there that is below par; its resistance is down, and if that man should happen to have some tubercular germs floating around in his system some place, which most of us have, that would be a very opportune place for them to locate and start housekeeping.

Q. In other words, tubercular germs are in the air, and we all breathe them at all times, and if a person is susceptible to them, they stick at that weak point?

A. That is the idea.

Q. Did you make any other X-ray photographs there, that you have, doctor?

A. Yes; I have a large chest plate here.

Q. That is looking from the front?

A. This is the left; this is the right side.

Q. What did that show the condition of the ribs?

A. Well, the lung itself is clear; the heart is normal in size and in position; he has a few adhesions around his diaphragm here, but the main thing is, he has had a dislocation of the third dorsal vertebra, with the spinous process twisted very sharply to the right.

Q. Now, what was the condition of the ribs, as to being joined to the sternum?

A. The sternum is very small, to begin with, and very poor calcification, but I don't see any evidence of fractures or dislocations.

Q. Doctor, would those conditions you have described of his arm and his hip, his pelvis, cause pain?

A. Absolutely.

Q. Would you say they would at this time?

A. Yes, sir.

Q. What would you say about the permanency, or other- [fol. 176] wise, of the pain?

A. Well, I would say it was permanent.

Q. State whether or not his left arm—I will withdraw that; I believe you have already stated—now, the shoulders being out of joint, would that have been painful?

A. At the time.

Q. But that has healed, I believe?

A. Yes, sir; I could not find any evidences of dislocation.

Q. Doctor, could these injuries which you have stated cause nervousness?

A. They could.

Q. Could they cause sleeplessness?

A. He complained—of course, it is a subjective symptom.

Q. Yes, sir.

A. But he complains of severe pain in his arm and in his hip during cloudy or rainy weather, which is usual.

Q. You mean usual to a person that has had a break?

A. Any injury of that sort.

Q. Yes; are you still treating him, doctor?

Plaintiff Ex. C

Plaintiff's Ex. D.

A. No, sir; I am not treating him at the present time; there is really nothing you can do for him.

Mr. Polak: You may examine, Mr. Hocker.

Mr. Hocker: That is all, doctor.

Mr. Polak: I would like to offer those plates in evidence that the doctor testified to. Can they be marked later; just be considered in evidence?

(Thereupon the reporter marked the same "Plaintiff's Exhibits L and M.")

Said Plaintiff's Exhibits L and M are in words and figures, respectively, as follows:

(By stipulation of the parties hereto said original X-ray photographs have been omitted from the printed record, [fol. 177] and in lieu thereof the said originals have been filed with the clerk of this court for the inspection of the Court.)

See supplemental abstract.

Mr. Polak: I may now offer to the jury Plaintiff's Exhibit B. Mr. Hocker, there are four of those; do you object to me offering them all at once?

Mr. Hocker: No.

Mr. Polak: Also Plaintiff's Exhibits C and D and E and Plaintiff's Exhibit F.

Said Plaintiff's Exhibits B, C, D, E and F are in words and figures, respectively, as follows:

(Here follow exhibits, marked side folio pages 177a, 177b, 177c, 177d, and 177e.)

Mr. Polak: I mean for the plat, Plaintiff's Exhibit G, to be in evidence, too, of the tracks.

Mr. Polak: That is the plaintiff's case, your Honor.

Thereupon the plaintiff rested his case.

Demurrer to Plaintiff's Evidence

Thereupon defendant Toledo, St. Louis and Western Railroad Company, by its counsel, presented to the Court,

in writing, and requested the Court to give and read to the jury the following instruction in the nature of a demurrer to the evidence:

"The Court instructs the jury that under the pleadings and evidence in this case the plaintiff cannot recover and your verdict must be for the defendant."

Which instruction the Court refused to give and read to the jury; to which action and ruling of the Court in refus- [fol. 178] ing to give said instruction defendant, by its counsel, then and there duly excepted and still excepts.

DEFENDANT'S EVIDENCE

OFFERS IN EVIDENCE

Thereupon the defendant, to support the issues on his behalf, offered and introduced the following evidence:

Mr. Hocker: I desire to offer in evidence the agreement and articles of consolidation of the five railroads into what is known as the New York, Chicago & St. Louis Railroad Company, comprising one of which is the Toledo, St. Louis and Western, the defendant in this case.

(Thereupon the reporter marked the same "Defendant's Exhibit 1.")

Mr. Polak: I object to it on the ground, your Honor, that it is immaterial, especially since our statute provides when railroads are consolidated that either or both shall be liable before or after consolidation; suit shall be brought against either one or the other or both of them.

Mr. Finley: Our statutes would not apply to this case.

Mr. Polak: Railroads running into Missouri.

Mr. Finley: This accident was over in Illinois and would be covered by the Illinois statutes.

The Court: Of course, I don't know anything about what [fol. 179] they have got over there; I don't know that it would be out of place.

Mr. Hocker: Sir?

The Court: I say, I don't know that it would be out of place.

Mr. Hocker: I don't think so. I figure they get in here, but I am not going to read them to the jury. I will save that.

The Court: I will permit it.

Mr. Polak: I object to that for the reason stated. The Court overrules my objection.

Mr. Hocker: I will offer these in evidence. I suppose they are one.

Mr. Polak: Do you mean by that to make the Toledo, St. Louis and Western a party?

Mr. Hocker: How?

Mr. Polak: Do you mean by that to bring in the Nickel Plate Railroad?

Mr. Hocker: Oh, no, no.

Mr. Polak: I move the Court that they be brought in by amendment. I think we can do that under the statutes, and that the absorbing railroad on motion can be made a party defendant if they want to come in here and muddy up the waters.

Mr. Hocker: That railroad is not offering this; it is the Toledo Railroad is offering it.

The Court: Yes; I don't see——

Said Defendant's Exhibit 1 is in words and figures as follows:

[fol. 180] DEFENDANT'S EXHIBIT 1

Agreement and articles of consolidation made and entered into the 28th day of December, 1922, by and between The New York, Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company, Toledo, St. Louis and Western Railroad Company, and also by and between the respective boards of directors of each of the several companies above named and the board of Directors of each of the other of said companies for the consolidation of said companies into one corporation to be known as "The New York, Chicago and St. Louis Railroad Company."

Indorsed: Approved as to form. W. A. Colston, Gen'l Counsel N. Y. C. & St. L. R. R. Co.

Agreement and articles of consolidation made and entered into this 28th day of December, 1922, by and between The New York, Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company, and Toledo, St. Louis and Western Railroad Company, and also by [fol. 181] and between the respective boards of directors of each of the several companies above named and the board of directors of each of the other of said companies, all of which said companies are hereinafter collectively referred to as the constituent companies, for the consolidation of said companies into one corporation, to be known as "The New York, Chicago and St. Louis Railroad Company," hereinafter more conveniently called the consolidated corporation.

Whereas The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies) is a consolidated railroad corporation now organized and existing under the laws of the States of Indiana, New York, Ohio and Pennsylvania, by virtue of a certain consolidation agreement heretofore duly and lawfully made, having power to maintain and operate a railroad from the City of Buffalo, in the State of New York, through the States of Pennsylvania, Ohio and Indiana, to a point on the boundary line between the States of Indiana and Illinois, all of which railroad is now constructed and is in the possession of and is owned and operated by the said constituent company, The New York, Chicago and St. Louis Railroad Company. The said constitutent company, The New York, Chicago and St. Louis Railroad Company, is authorized to do business in the State of Illinois and under this power leases and operates the line of The Chicago and State Line Railroad Company hereinafter described. The authorized capital stock of The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constitutent companies) is Thirty Million Dollars ($30,000,-[fol. 182] 000.00) divided into Three Hundred Thousand (300,000) shares of the part value of One Hundred Dollars ($100) each, of which Fifty Thousand (50,000) shares, amounting to Five Million Dollars, ($5,000,000.00) par

value is first preferred stock, One Hundred and Ten Thousand (110,000) shares, amounting to Eleven Million Dollars ($11,000,000.00) par value is second preferred stock, and One Hundred and Forty Thousand (140,000) shares, amounting to Fourteen Million Dollars ($14,000,000.00) par value is common stock, all of which has been issued. In respect of the aforesaid issued stock, Forty-nine Thousand Nine Hundred and Seventy-nine (49,979) shares of the first preferred stock, One Hundred and Nine Thousand Nine Hundred and Ninety-eight (109,998) shares of the second preferred stock, and One Hundred and Thirty-nine Thousand Eight Hundred and Ninety-six (139,896) shares of the common stock are actually outstanding, and Twenty-one (21) shares of the first preferred stock, Two (2) shares of the second preferred stock, and One Hundred and Four (104) shares of the common stock have been issued but are held in the treasury of said company. The number of its directors is fifteen.

The Chicago and State Line Railroad Company is a railroad corporation organized and existing under and by virtue of the laws of the State of Illinois, and owing a line of railroad which extends from a point on the boundary line between the State of Indiana and Illinois to and into the City of Chicago, in the State of Illinois. Its authorized capital stock is One Million Five Hundred Thousand Dollars ($1,500,000.00) divided into Fifteen Thousand (15,000) shares of the par value of One Hundred Dollars ($100) each [fol. 183] of which Two Thousand Five Hundred (2,500) shares is first preferred stock, Five Thousand Five Hundred (5,500) shares is second preferred stock, and Seven Thousand (7,000) shares is common stock. All of the aforesaid stock, first preferred, second preferred and common, has been issued and is actually outstanding and is owned by The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies). The railroad owned by The Chicago and State Line Railroad Company is leased to The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies), by lease dated September 1, 1887, for the term of the corporate existence of the lessor company, at a rental of One Hundred Dollars ($100.00) per annum, and all administration expenses. The number of

directors of The Chicago and State Line Railroad Company is nine.

The Lake Erie and Western Railroad Company is a railroad corporation organized and existing under and by virtue of the laws of the State of Illinois, and is the owner of a line of railroad from Sandusky, in the State of Ohio, through the State of Indiana, to Peoria, in the State of Illinois, and also a line of railroad from the Michigan City to Indianapolis, in the State of Indiana, all of which railroad is now constructed, and is operated, managed and controlled by The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies), by virtue of an agreement dated July 5, 1922, authorized by the Interstate Commerce Commission in Finance Docket No. 2471, pursuant to the provisions of paragraph (2) of section 5 of the Interstate Commerce [fol. 184] Act. The authorized capital stock of said The Lake Erie and Western Railroad Company is Fifty Million Dollars ($50,000,000.00) divided into Five Hundred Thousand (500,000) shares of the par value of One Hundred Dollars ($100) each, of which Two Hundred and Fifty Thousand (250,000) shares, amounting to Twenty-five Million Dollars ($25,000,000.00) par value is preferred stock, and Two Hundred and Fifty Thousand (250,000) shares, amounting to Twenty-five Million Dollars ($25,000,000.00) par value is common stock. Of each of the two aforesaid classes of stock, One Hundred and Eighteen Thousand Four Hundred (118,400) shares have been issued and are actually outstanding, and One Hundred and Thirty-one Thousand Six Hundred (131,600) shares are unissued. The number of directors of The Lake Erie and Western Railroad Company is nine.

Fort Wayne, Cincinnati and Louisville Railroad Company is a railroad corporation organized and existing under and by virtue of the law of the State of Indiana, owning a line of railroad from Fort Wayne to Connersville, and also a line of railroad from New Castle to Rushville, all in said state. Its authorized capital stock is Four Million Dollars ($4,000,000.00), divided into Forty Thousand (40,000) shares of the par value of One Hundred Dollars ($100) each, of which Thirty-seven Thousand Eight Hundred and Seventy-nine (37,879) shares have

been issued, and Two Thousand One Hundred and Twenty (2,121) shares are unissued. All of the aforesaid issued stock of said company is actually outstanding and is owned by The Lake Erie and Western Railroad Company, and the railroad owned by Fort Wayne, Cincinnati and [fol. 185] Louisville Railroad Company is now operated, managed and controlled by The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies) under the aforesaid agreement dated July 5, 1922, authorized by the Interstate Commerce Commission as aforesaid. The number of Directors of the said Fort Wayne, Cincinnati and Louisville Railroad Company is nine.

Toledo, St Louis and Western Railroad Company is a railroad corporation organized and existing under and by virtue of the laws of the State of Indiana, and is now in the hands of a receiver appointed on October 22, 1914, by the District Court of the United States for the Northern District of Ohio, Western Division, in the case of Horatio C. Creith vs. Toledo, St. Louis and Western Railroad Company, who is operating its line of railroad from Toledo, in the State of Ohio, through the States of Indiana and Illinois, to East St. Louis, in the State of Illinois. Said company's authorized capital stock is Twenty Million Dollars ($20,000,000.00), divided into Two Hundred Thousand (200,000) shares of the par value of One Hundred Dollars ($100) each, of which One Hundred Thousand (100,000) shares, amounting to Ten Million Dollars ($10,000,000.00) par value is preferred stock, and One Hundred Thousand (100,000) shares, amounting to Ten Million Dollars ($10-000,000.00) par value is common stock. Ninety-nine Thousand Five Hundred and Seventy-three and Forty One-hundredths (99,573 40/100) shares of the preferred stock and Ninety-nine Thousand Nine Hundred and Fifty-four and Thirty One-hundredths (99,954 30/100) shares of the common stock have been issued and are actually outstanding, and Four Hundred and Twenty-six and Sixty One-hun- [fol. 186] dredths (426 60/100) shares of the preferred stock and Forty-five and Seventy One-hundredths (45 70/100) shares of the common stock have been issued, but are held in the treasury of said company. The number of directors of said company is eleven;

Whereas, the said railroads of the constituent companies connect and form with each other continuous, but not parallel or competing, lines of railroad; and

Whereas, the parties hereto propose to consolidate said companies into one corporation, and to vest in and to convey to such consolidated corporation the railroads, properties and franchises of the constituent companies, under and in pursuance of the provisions of the laws of the States of Illinois, Indiana, New York, Ohio and Pennsylvania;

Now, Therefore, This Agreement, Witnesseth:

That in consideration of the mutual agreements, covenants and provisions herein contained, the parties hereto do by these presents merge and consolidate the respective capital stocks, franchises, and properties of the aforesaid constituent companies into one corporation to be called and known as "The New York, Chicago and St. Louis Railroad Company," which said consolidated corporation shall from henceforth have and possess all and singular the rights, franchises, powers, exemptions, immunities, privileges and capacities which are or have been granted to or conferred upon, or possessed or enjoyed by, the said constituent companies.

And this agreement further witnesseth, that the parties hereto have agreed upon and by these presents do agree [fol. 187] upon and prescribe the following as the terms and conditions of this agreement and articles of consolidation, which terms and conditions the parties hereto mutually promise and agree to observe, keep and perform, viz.:

Article I

The name of the consolidated corporation shall be "The New York, Chicago and St. Louis Railroad Company."

Article II

The principal office of the consolidated corporation shall be located in the City of Cleveland, Ohio, but it may be removed by order of the board of directors to any location in any state in which said corporation is incorporated.

Article III

The number of directors of the consolidated corporation shall be fifteen.

Article IV

The names and places of residence of the fifteen directors of the consolidated corporation who shall manage its affairs for the first year, or until others are chosen in their places, are as follows:

O. P. Van Sweringen, 17400 South Park Boulevard, Shaker Heights, Ohio.

M. J. Van Sweringen, 17400 South Park Boulevard, Shaker Heights, Ohio.

J. J. Bernet, 12349 Cedar Road, Cleveland Heights, Ohio.

Walter L. Ross, Apartment No. 8, The Williston Apartments, Toledo, Ohio.

C. E. Denney, 13732 Euclid Avenue, East Cleveland, Ohio.

W. A. Colston, Cleveland Hotel, Superior Avenue and Public Square, Cleveland, Ohio.

[fol. 188] J. R. Nutt, 2285 Coventry Road, Cleveland Heights, Ohio.

C. L. Bradley, 2301 Coventry Road, Cleveland Heights, Ohio.

Otto Miller, 2700 Eaton Road, Shaker Heights, Ohio.

John Sherwin, Waite Hill, Willoughby, Ohio.

F. H. Ginn, 1909 East 71st Street, Cleveland, Ohio.

F. E. Myers, 726 Center Street, Ashland, Ohio.

J. A. House, 9701 Lamont Avenue, Cleveland, Ohio.

Ralph Van Vechten, 2344 Lincoln Park West, Chicago, Illinois.

George S. Ross, 522 Nottingham Terrace, Toledo, Ohio.

Article V

The officers of said consolidated corporation shall be a Chairman of the Board, a President, as many Vice Presidents as the board of directors may appoint, a Secretary, a Treasurer, and such other officers as may, from time to time, be provided for by the by-laws or regulations or appointed by the board of directors. The same person may be Secretary and Treasurer.

The names and places of residence of the principal officers for the first year or until others are appointed in their places are as follows:

Chairman of the Board, O. P. Van Sweringen, 17400 South Park Boulevard, Shaker Heights, Ohio.

President, J. J. Bernet, 12349 Cedar Road, Cleveland Heights, Ohio.

Senior Vice President, Walter L. Ross, Apartment No. 8, The Williston Apartments, Toledo, Ohio.

[fol. 189] Vice President, M. J. Van Sweringen, 17400 South Park Boulevard, Shaker Heights, Ohio.

Vice President, J. R. Nutt, 2285 Coventry Road, Cleveland Heights, Ohio.

Vice President, C. L. Bradley, 2301 Coventry Road, Cleveland Heights, Ohio.

Vice President, Otto Miller, 2700 Eaton Road, Shaker Heights, Ohio.

Vice President, John Sherwin, Waite Hill, Willoughby, Ohio.

Vice President, C. E. Denney, 13732 Euclid Avenue, East Cleveland, Ohio.

Vice President, W. A. Colston, Cleveland Hotel, Superior Avenue and Public Square, Cleveland, Ohio.

Secretary, George S. Ross, 522 Nottingham Terrace, Toledo, Ohio.

Treasurer, L. B. Williams, 12546 Cedar Road, Cleveland Heights, Ohio.

The several departmental officers of the constituent companies shall be continued, subject to the provisions of the by-laws or regulations, as departmental officers of the consolidated corporation, with such changes in titles and duties as their officers superior in rank or the board of directors may determine.

Article VI

The board of directors shall have complete control of the affairs of said consolidated corporation, and shall have power to adopt and amend by-laws for its government, to fill vacancies occurring in the board from any cause, to appoint an executive committee, and in so far as may be permitted by law, to vest said committee with such powers as they may determine, and to appoint such officers as in their [fol. 190] judgment they may deem necessary. The board of directors may also call special meetings of the stockholders at any time. A majority of the board of directors shall constitute a quorum. Until new by-laws are adopted

by the board of directors, the by-laws of The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies) shall be the by-laws of the consolidated corporation.

Article VII

There shall be an annual meeting of the stockholders of said consolidated corporation held on the first Wednesday in May of each year, at its principal office, at which directors of said consolidated corporation for the ensuing year shall be elected by a majority vote of the common stock voted in person or by proxy; but the date of such annual meeting may be changed by the by-laws. The directors so elected shall continue in office until others are chosen and qualify.

The Chairman of the Board and the President shall be chosen by ballot of the directors, and Vice President, a Secretary and a Treasurer shall be appointed by the board at the first or any subsequent meeting of the board after the annual election; and vacancies in office shall be filled by the board. The directors of said consolidated corporation from time to time may appoint such other officers as they may deem necessary, who shall hold their respective offices during the pleasure of the board.

Article VIII

The amount of the capital stock of the consolidated corporation shall be One Hundred and Five Million Five Hun- [fol. 191] dred Thousand Dollars ($105,500,000.00), divided into One Million and Fifty-five Thousand (1,055,000) shares of the par value of One Hundred Dollars ($100) each, of which Four Hundred and Fifty-eight Thousand Eight Hundred (458,800) shares, amounting to Forty-five Million Eight Hundred and Eighty Thousand Dollars ($45,880,000.00) par value, shall be cumulative preferred stock, and Five Hundred and Ninety-six Thousand Two Hundred (596,200) shares, amounting to Fifty-nine Million Six Hundred and Twenty Thousand Dollars ($59,620,-000.00) par value, shall be common stock.

Seven Hundred and Eighty-nine Thousand Six Hundred and Seventy-nine (789,679) shares of said capital stock,

consisting of Three Hundred and Twenty-seven Thousand Two Hundred (327,200) shares of the cumulative preferred stock, "Series A," with Six per centum (6%) per annum cumulative preferred dividends, and Four Hundred and Sixty-two Thousand Four Hundred and Seventy-nine (462,479) shares of the common stock, after the said consolidation shall have become effective, shall be immediately issued in exchange for the issued capital stock of said constituent companies on the several bases hereinafter set forth in Article IX of this agreement.

The remainder of said One Million and Fifty-five Thousand (1,055,000) shares of capital stock, namely, Two Hundred and Sixty-five Thousand Three Hundred and Twenty-one (265,321) shares, consisting of One Hundred and Thirty-one Thousand Six Hundred (131,600) shares of cumulative preferred stock, and One Hundred and Thirty-three Thousand Seven Hundred and Twenty-one (133,721) [fol. 192] shares of common stock, may be issued from time to time when authorized by the board of directors of the consolidated corporation, but the stockholders of the consolidated corporation shall have no prior or pre-emptive right to subscribe for such stock when issued and said cumulative preferred stock may be issued in such series within the limits hereinafter provided as may appear proper to the board of directors.

Article IX

The manner of converting the capital stock of each of the constituent companies into stock of the consolidated corporation, and the distribution of said Seven Hundred and Eighty-nine Thousand Six Hundred and Seventy-nine (789,679) shares of the capital stock of said consolidated corporations, so to be immediately issued in exchange for issued capital stock of said constituent companies shall be as in this Article IX provided:

(a) The Seven Hundred and Eighty-nine Thousand Six Hundred and Seventy-nine (789,679) shares of issued capital stock of the constituent companies, upon their proper transfer and delivery to said consolidated corporation shall be converted into Seven Hundred and Eighty-nine Thousand Six Hundred and Seventy-nine (789,679) shares

of the capital stock of the consolidated corporation upon the terms and conditions in this Article IX provided.

(b) The holders of the Two Hundred and Ninety-nine Thousand Eight Hundred and Seventy-three (299,873) actually outstanding shares of capital stock of The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies), upon its proper transfer [fol. 193] and delivery to said consolidated corporation, shall be entitled to Two Hundred and Ninety-nine Thousand Eight Hundred and Seventy-three (299,873) shares of the capital stock of the consolidated corporation, upon the following bases, provided, however, that the Fifteen Thousand (15,000) shares of the capital stock of the consolidated corporation to be exchanged for Fifteen Thousand (15,000) shares of the capital stock of The Chicago and State Line Railroad Company as hereinafter provided shall be contributed and turned over to the said consolidated corporation as fully paid-up treasury stock:

Each of the Forty-nine Thousand Nine Hundred and Seventy-nine (49,979) actually outstanding shares of the first preferred stock of The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constitutent companies), upon its proper transfer and delivery to said consolidated corporation, shall be exchangeable for and convertible into One (1) share of the cumulative preferred stock, "Series A," of said consolidated corporation;

Each of the One Hundred and Nine Thousand Nine Hundred and Ninety-eight (109,998) actually outstanding shares of the second preferred stock of The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies), upon its proper transfer and delivery to said consolidated corporation, shall be exchangeable for and convertible into One (1) share of the cumulative preferred stock, "Series A." of said consolidated corporation;

[fol. 194] Each of the One Hundred and Thirty-nine Thousand Eight Hundred and Ninety-six (139,896) actually outstanding shares of the common stock of The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies), upon its proper transfer and delivery to said consolidated corporation, shall be ex-

changeable for and convertible into One (1) share of the common stock of said consolidated corporation.

(c) The shares of stock of The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies), which have been issued but are held in the treasury of said company, namely, One Hundred and Twenty-seven (127) shares, consisting of Twenty-one (21) shares of the first preferred stock, Two (2) shares of the second preferred stock, and One Hundred and Four (104) shares of the common stock, shall be converted into One Hundred and Twenty-seven (127) shares of stock of the consolidated corporation, upon the same bases respectively as are provided in paragraph (b) of this Article IX for the conversion of the actually outstanding shares of first preferred, second preferred, and common stock of said constituent company. When so converted, said One Hundred and Twenty-seven (127) shares of stock of the consolidated corporation shall be contributed and turned over to and held in the treasury of the consolidated corporation upon the same uses, trusts and conditions, if any, as said amounts of stock are now held by said constituent company, and such shares thereof as are not held in trust may be sold or exchanged from time to time for such amounts and upon such terms as the board of directors may deem [fol. 195] to be the consolidated corporation's best interests.

(d) The outstanding capital stock of The Chicago and State Line Railroad Company, owned by The New York, Chicago and St. Louis Railroad Company, (meaning thereby one of the constituent companies), namely, Fifteen Thousand (15,000) shares, consisting of Two Thousand Five Hundred (2,500) shares of first preferred stock, Five Thousand Five Hundred (5,500) shares of second preferred stock, and Seven Thousand (7,000) shares of common stock, and being the entire capital stock of The Chicago and State Line Railroad Company, shall be converted (preferred stock into cumulative preferred stock, "Series A," and common stock into common stock) into Fifteen Thousand (15,000) shares of capital stock of the consolidated corporation, consisting of Eight Thousand (8,000) shares of cumulative preferred stock, "Series A," and Seven Thousand (7,000) shares of common stock of the consoli-

dated corporation, which shall be contributed and turned over to the consolidated corporation as fully paid-up treasury stock to be sold or held upon the same uses, trusts and conditions, if any, as the capital stock of The Chicago and State Line Railroad Company is now held by The New York, Chicago and St. Louis Railroad Company (meaning thereby one of the constituent companies). Any of such treasury stock so contributed and turned over as is not held in trust may be sold or exchanged from time to time for such amounts and upon such terms as the board of directors of the consolidated corporation shall deem to be to the consolidated corporation's best interests.

[fol. 196] (e) The Two Hundred and Thirty-six Thousand Eight Hundred (236,800) issued and outstanding shares of capital stock of The Lake Erie and Western Railroad Company, upon the proper transfer and delivery thereof to said consolidated corporation, shall be converted into Two Hundred and Thirty-six Thousand Eight Hundred (236,800) shares of capital stock of the consolidated corporation, of which Seventy-six Thousand Nine Hundred and Sixty (76,960) shares shall be contributed by the shareholders to said consolidated corporation as fully paid-up treasury stock, which may be sold or exchanged from time to time for such amounts and upon such terms as the board of directors may deem to be to the consolidated corporation's best interests, and One Hundred and Fifty-nine Thousand Eight Hundred and Forty (159,840) shares shall be retained by the shareholders upon the following bases and conditions, provided, however, that the Thirty-seven Thousand Eight Hundred and Seventy-nine (37,879) shares of the capital stock of the consolidated corporation to be exchanged for Thirty-seven Thousand Eight Hundred and Seventy-nine (37,879) shares of the capital stock of Fort Wayne, Cincinnati and Louisville Railroad Company as hereinafter provided shall be contributed and turned over to the said consolidated corporation as fully paid-up treasury stock:

The conversion of the One Hundred and Eighteen Thousand Four Hundred (118,400) outstanding shares of the preferred stock of The Lake Erie and Western Railroad Company, shall be one-half into cumulative preferred stock,

[fol. 197] "Series A," and one-half into common stock of the consolidated corporation and each of the One Hundred and Eighteen Thousand Four Hundred (118,400) outstanding shares of the preferred stock of The Lake Erie and Western Railroad Company, upon its proper transfer and delivery to said consolidated corporation, shall be exchangeable for Fifty One-hundredths (50/100) of One (1) share of the cumulative preferred stock, "Series A," and Fifty One hundredths (50/100) of One (1) share of the common stock of said consolidated corporation, of which there shall be retained by the shareholder Fifty One-hundredths (50/100) of One (1) share of the cumulative preferred stock, "Series A," and Forty One-hundredths (40/100) of One (1) share of the common stock, provided, however, that for each share of preferred stock of the constituent company so exchanged there shall be contributed by the shareholder to the consolidated corporation as fully paid-up treasury stock One-tenth (1/10) of One (1) share of the common stock of said consolidated corporation;

Each of the One Hundred and Eighteen Thousand Four Hundred (118,400) outstanding shares of the common stock of The Lake Erie and Western Railroad Company, upon its proper transfer and delivery to said consolidated corporation, shall be exchangeable for One (1) share of the common stock of the consolidated corporation, of which Forty-five One-hundredths (45/100) of One (1) share shall be retained by the shareholder, provided, however, that for each share of common stock of the constituent company so exchanged there shall be contributed by the shareholder to the consolidated corporation as fully paid-up treasury [fol. 198] stock, Fifty-five One-hundredths (55/100) of One (1) share of the common stock of the said consolidated corporation.

(f) The outstanding capital stock of Fort Wayne, Cincinnati and Louisville Railroad Company, owned by The Lake Erie and Western Railroad Company, namely, Thirty-seven Thousand Eight Hundred and Seventy-nine (37,879) shares, being all of the outstanding stock of Fort Wayne, Cincinnati and Louisville Railroad Company, shall be converted into Thirty-seven Thousand Eight Hundred and Seventy-nine (37,879) shares of common stock of the con-

solidated corporation, which shall be contributed and turned over to the consolidated corporation as fully paid-up treasury stock which may be sold or exchanged from time to time for such amounts and upon such terms as the board of directors may deem to be to the consolidated corporation's best interests.

(g) The One Hundred and Ninety-nine Thousand Five Hundred and Twenty-seven and Seventy One-hundredths (199,527 70/100) issued and actually outstanding shares of capital stock of Toledo, St. Louis and Western Railroad Company, upon proper transfer and delivery thereof to said consolidated corporation, shall be converted into One Hundred and Ninety-nine Thousand Five Hundred and Twenty-seven and Seventy One-hundredths (199,527 70/100) shares of capital stock of the consolidated corporation, of which Fifty-four Thousand Eight Hundred and Forty-one and Fifty-five One-hundredths (54,841 55/100) shares shall be contributed by the shareholders to said consolidated corporation as fully paid-up treasury stock, which [fol. 199] may be sold or exchanged from time to time for such amounts and upon such terms as the board of directors may deem to be to the consolidated corporation's best interests, and One Hundred and Forty-four Thousand Six Hundred and Eighty-six and Fifteen One-hundredths (144,686 15/100) shares shall be retained by the shareholders upon the following bases and conditions:

Each of the Ninety-nine Thousand Five Hundred and Seventy-three and Forty One-hundredths (99,573 40/100) actually outstanding shares of the preferred stock of Toledo, St. Louis and Western Railroad Company, upon its proper transfer and delivery to said consolidated corporation, shall be exchangeable for One (1) share of the cumulative preferred stock, "Series A," of said consolidated corporation, of which Sixty-five One-hundredths (65/100) of One (1) share shall be retained by the shareholder, provided, however, that for each of the shares of the preferred stock of said constituent company so exchanged there shall be contributed by the shareholder to the consolidated corporation, as fully paid-up treasury stock, Thirty-five One-hundredths (35/100) of One (1) share of the cumulative preferred stock, "Series A," of said consolidated corporation;

Each of the Ninety-nine Thousand Nine Hundred and Fifty-four and Thirty One-hundredths (99,954 30/100) actually outstanding shares of the common stock of Toledo, St. Louis and Western Railroad Company, upon its proper transfer and delivery to said consolidated corporation, shall be exchangeable for One (1) share of the common stock [fol. 200] of said consolidated corporation, of which Eighty One-hundredths (80/100) of One (1) share shall be retained by the shareholder, provided, however, that for each share of common stock of said constituent company so exchanged there shall be contributed by the shareholder to the consolidated corporation as fully paid-up treasury stock, Twenty One-hundredths (20/100) of One (1) share of the common stock of said consolidated corporation.

(h) The shares of capital stock of Toledo, St. Louis and Western Railroad Company which have been issued but are held in the treasury of said company, namely Four Hundred and Seventy-two and Thirty One-hundredths (472 30/100) shares, consisting of Four Hundred and Twenty-six and Sixty One-hundredths (426 60/100) shares of preferred stock and Forty-five and Seventy One-hundredths (45 70/100) shares of common stock, shall be converted into Four Hundred and Seventy-two and Thirty One-hundredths (472 30/100) shares of stock of the consolidated corporation, of which One Hundred and Fifty-eight and Forty-five One-hundredths (158 45/100) shares, consisting of One hundred and Forty-nine and Thirty-one One-hundredths (149 31/100) shares of cumulative preferred stock, "Series A," and Nine and Fourteen One-hundredths (9 14/100) shares of common stock, shall be contributed and turned over to said consolidated corporation as fully paid-up treasury stock, and Three Hundred and Thirteen and Eighty-five One-hundredths (313 85/100) shares, consisting of Two Hundred and Seventy-seven and Twenty-nine One-hundredths (277 29/100) shares of cumulative pre- [fol. 201] ferred stock, "Series A," and Thirty-six and Fifty-six One-hundredths (36 56/100) shares of common stock, shall be held in the treasury of said consolidated corporation upon the same uses, trusts, and conditions, if any, as said amounts of stock are now held by said constitutent company. Any of such treasury stock so con-

tributed, turned over or held as is not held in trust, may be sold or exchanged from time to time for such amounts and upon such terms as the board of directors may deem to be to the consolidated corporation's best interests.

(i) Should any stockholder be entitled to retain a fraction of a share of stock of the consolidated corporation, a certificate of ownership thereof shall be issued to him. Such certificate shall provide that when certificates for fractions of shares of stock equal to one or more whole shares shall be presented and surrendered to said consolidated corporation, a certificate for a full share or shares of stock, equal in amount to the aggregate of such fractions of shares, shall be issued in place thereof; but fractions of shares shall not be entitled to any interest or dividend, nor shall any holder thereof be entitled to vote thereon at any meeting of the stockholders.

(j) After the consolidation shall have become effective, there shall be no further issue or transfer of certificates of stock of the constituent companies, and from time to time after the consolidation shall have become effective as such certificates are presented to the consolidated corporation they hall be cancelled and certificates of stock of the consolidated corporation shall be issued on the several bases and conditions above set forth in exchange therefor. After the consolidation shall have become effective, the [fol. 202] shares of stock of the constituent companies shall not be entitled to any interest or dividend, nor shall any holder thereof be entitled to vote thereon at any meeting of stockholders until conversion into and distribution of shares of stock of the consolidated corporation in respect thereof as hereinabove provided.

Article X

All of the cumulative preferred stock of the consolidated corporation shall constitute one class of stock which shall be preferred both as to dividends and as to assets as in this Article X provided. This class of stock may be issued in one or more series from time to time, all series in the class being of equal rank but differing as to terms in the respects hereinafter stated as the board of directors shall determine.

The cumulative preferred stock of the consolidated corporation, amounting to Three Hundred and Twenty-seven Thousand Two Hundred (327,200) shares of the total par value of Thirty-two Million Seven Hundred and Twenty Thousand Dollars ($32,720,000) to be issued immediately after the consolidation shall have become effective shall be issued in "Series A." The remainder of the cumulative preferred stock initially authorized, namely, One Hundred and Thirty-one Thousand Six Hundred (131,600) shares of the total par value of Thirteen Million One Hundred and Sitxy Thousand Dollars ($13,160,000), and any further amounts of cumulative preferred stock which may be hereafter authorized, may be issued in "Series A" or in any other series in the discretion of the board of directors.

[fol. 203] The holders of the cumulative preferred stock, "Series A," of the consolidated corporation shall be entitled to receive from income or surplus of the consolidated corporation, when and as declared by the board of directors, dividends at the rate of Six per centum (6%) per annum payable in preference and priority to any payment of any dividend on the common stock, the same to be payable quarterly on dates to be fixed by the board of directors. Such dividends shall be cumulative, so that if in any quarterly dividend period dividends at the rate of Six per centum (6%) per annum shall not have been paid upon or set apart for the cumulative preferred stock, "Series A," the deficiency shall be fully paid or set apart for payment before any dividends shall be paid upon or set apart for the common stock. After three years from the date of issue the outstanding cumulative preferred stock, "Series A," may be redeemed in whole, or from time to time in amounts of not less than One Million Dollars ($1,000,000) par value, on any quarterly dividend payment date, at the option of the board of directors, upon not less than sixty nor more than ninety days' notice to the holders of record of said cumulative preferred stock, "Series A," given by mail and by publication in such manner as may be prescribed by the by-laws of the consolidated corporation or by resolution of the board of directors, by payment in cash for each share of stock so to be redeemed of One Hundred and Ten per centum (110%) of the par amount thereof and in addition thereto all dividends ac-

mulated and unpaid thereon. If less than all of the out-
nding shares of said cumulative preferred stock,
eries A," are to be redeemed, such redemption may be
l. 204] made pro rata, or the shares to be redeemed
y be selected by lot, in either case in such manner as
y be prescribed by resolution of the board of directors.
n the event of the involuntary liquidation or dissolu-
n of the consolidated corporation or involuntary sale and
nding up of its properties, the holders of the outstanding
mulative preferred stock, "Series A," shall be entitled
receive out of the assets of the consolidated corporation,
ether capital or surplus, the par value of their respec-
e shares and an amount which shall be equal to the
idends accumulated and unpaid thereon, before any pay-
nt shall be made to the holders of the common stock, but
all not participate further in the distribution of said
sets. But in the event of the voluntary liquidation or dis-
ution of the consolidated corporation or voluntary sale
d winding up of its properties, the holders of the cumula-
e preferred stock, "Series A," shall be entitled to re-
ve out of the assets of the corporation, whether capital
surplus, One Hundred and Ten per centum (110%) of
e par value of their respective shares and an amount
ich will be equal to the dividends accumulated and un-
id thereon, before any payment shall be made to the
lders of the common stock, but shall not participate fur-
r in the distribution of said assets.

The holders of the cumulative preferred stock of the con-
idated corporation of series other than "Series A" shall
entitled to receive, when and as declared by the board of
rectors, dividends at such rate or rates not exceeding
l. 205] Eight per centum (8%) per annum as shall be
termined by the board of directors upon the creation of
ch series payable in preference and priority to any pay-
nt of any dividend on the common stock, the same to be
yable quarterly on dates to be fixed by the board of di-
tors. Such dividends shall be cumulative, so that if
any quarterly dividend period dividends at the rate de-
rmined by the board of directors upon the creation of the
spective series shall not have been paid upon or set apart
the series respectively, the deficiency shall be fully paid
set apart for payment before any dividends shall be paid

or set apart for the common stock. After three years from the date of issue the outstanding cumulative preferred stock of any series other than "Series A" may be redeemed in whole, or from time to time in amounts of not less than One Million Dollars ($1,000,000) par value, on any quarterly dividend payment date, at the option of the board of directors, upon not less than sixty nor more than ninety days' notice to the holders of record of said cumulative preferred stock of the series to be redeemed given by mail and by publication in such manner as may be prescribed by the by-laws of the consolidated corporation or by resolution of its board of directors, by payment in cash for each share of stock so to be redeemed of an amount to be fixed by the board of directors at the time of issuing or authorizing the series, which amount shall not exceed One Hundred and Fifteen per centum (115%) of the par amount thereof and in addition thereto all dividends accumulated and unpaid thereon. If less than all of the outstanding shares of any [fol. 206] of said cumulative preferred stock are to be redeemed, such redemption may be made pro rata, or the shares to be redeemed may be selected by lot, in either case in such manner as may be prescribed by resolution of the board of directors.

In the event of the involuntary liquidation or dissolution of the consolidated corporation or involuntary sale and winding up of its properties, the holders of the outstanding cumulative preferred stock of any series other than "Series A" shall be entitled to receive out of the assets of the corporation, whether capital or surplus, the par value of their respective shares and an amount which shall be equal to the dividends accumulated and unpaid thereon, before any payment shall be made to the holders of the common stock, but shall not participate further in the distribution of said assets. But in the event of the voluntary liquidation or dissolution of the consolidated corporation or voluntary sale and winding up of its properties, the holders of the cumulative preferred stock of series other than "Series A" shall be entitled to receive out of the assets of the corporation, whether capital or surplus, the redemption price thereof determined in the manner above prescribed, including all dividends accumulated and unpaid, before any payment shall be

made to the holders of the common stock, but shall not participate further in the distribution of said assets.

If at any time cumulative preferred stock of more than one series is outstanding, any dividends paid on the cumulative preferred stock in an amount less than the full amount payable on all cumulative preferred stock of all series outstanding shall be divided between the outstanding [fol. 207] series of the cumulative preferred stock in proportion to the aggregate sums which would be distributable to the cumulative preferred stock of each series if full dividends were declared and paid thereon, and if in the event of the liquidation or dissolution of the consolidated corporation or sale and winding up of its properties there shall be outstanding cumulative preferred stock of more than one series and of different redemption values or bearing different rates of dividend, and the assets of the corporation should not be sufficient to pay the full demands of all of the cumulative preferred stock as hereinabove provided, the assets shall be distributed between the outstanding series of the cumulative preferred stock in proportion to the aggregate sums which would be distributable to the cumulative preferred stock of each series if full distribution were made.

The holders of cumulative preferred stock of any series shall not be entitled to participate in any other or additional profits, earnings or dividends than the preferred dividends above provided and, except as hereinafter provided with respect to creation of classes of stock having preference as to dividends or as to assets over the cumulative preferred stock, they shall have no voting powers whatsoever, nor shall they be entitled to notice of any meeting of stockholders of the consolidated corporation, unless the limitation of voting powers of preferred stock is expressly prohibited or restricted by law and then only to the extent expressly required by such express restriction or prohibition and only so long as such restrictive or prohibitory law or laws shall not have been repealed and shall [fol. 208] continue to be in full force and effect; provided, however, that if and when four quarterly dividends upon the cumulative preferred stock shall be in arrears, or if and when the consolidated corporation shall have allowed a con-

tinuous period of two years to elapse, during the course of which it shall at no time have fully paid up all amounts due to holders of the cumulative preferred stock on accumulated or current dividends, then in either of such events the holders of such cumulative preferred stock shall be entitled to notice of any annual or special stockholders' meeting called for the purpose of electing directors until payment of dividends on the cumulative preferred stock has been resumed and all unpaid dividends have been paid in full. Such notice is to be given in the same manner as is provided for giving similar notice to the holders of common stock, and at such meetings the holders of such cumulative preferred stock shall be entitled to elect three of the directors for the next ensuing year by a majority vote of such cumulative preferred stock voted in person or by proxy at such meetings. Such right of the holders of the cumulative preferred stock to notice and to voting power shall cease in the event that the defaulted dividends are paid.

In the event of merger or consolidation of the consolidated corporation with any other corporation or corporations the cumulative preferred stock of all series shall be exchangeable for stock of the new consolidated corporation or for stock of the corporation into which merger is affected at the ratios and upon the terms and conditions agreed upon in the articles of agreement of merger or consolidation, or shall be redeemable as provided by law but at not more than the redemption prices, including accu- [fol. 209] mulated and unpaid dividends, provided or determined as above set forth.

The common stock shall be subject to the prior rights of the holders of the cumulative preferred stock of all series, as in this Article X declared. If after the declaration and payment in full of all dividends for all previous quarterly dividend periods and for the current quarterly dividend period on all outstanding series of the cumulative preferred stock or if after such declaration a sum sufficient for the payment thereof shall have been set aside from the surplus or net profits of said corporation there shall remain any surplus or net profits of such period or periods or of any preceding period or periods, any or all such surplus or net profits of such period and of any and all preceding periods, including the surpluses of the constituent companies merged

into the surplus of the consolidated corporation, shall be applicable to dividends upon the common stock. And out of any such surplus or net profits the board of directors may in their discretion declare and pay dividends upon the common stock upon any of the dividend payment dates fixed as aforesaid but not until after the dividends upon the cumulative preferred stock of all series for the current quarterly dividend period shall have been actually paid or provided for or set apart.

Article XI

The capital stock of the consolidated corporation may hereafter be increased from time to time at a duly convened stockholders' meeting by a majority vote of the stock [fol. 210] represented at such meeting either in person or by proxy, each share of common stock being entitled to one vote. In any such case, such increase may be in either common stock alone, preferred stock alone, or common and preferred stock, and in such amounts in respect of each as are permissible by law, provided, however, that the preferred stock, whether of the issue herein authorized or of any other issue having preference as to dividends or assets over the common stock, shall not at any time hereafter be increased beyond the total amount hereinbefore in Article VIII hereof authorized, so as to result, because of the additional preferred stock authorized, in an actually outstanding amount of preferred stock at par value in excess of Sixty per centum (60%) of the par value of the total capital stock then actually outstanding, provided further, that no class of stock having preferences, either as to dividends or as to assets, over the cumulative preferred stock herein provided for shall be created without the consent of two-thirds (⅔) in interest of the preferred stock then outstanding (but this provision shall not relate to rates of dividend nor to rates of distribution), nor, if and so long as such consent may be expressly required by law, shall any new class of stock be created without the consent of two-thirds (⅔) in interest of the outstanding stock entitled to vote, but this restriction shall apply only if and so long as such law may be and shall continue in effect. The new shares shall be issued upon such terms and conditions, and with such rights and privileges annexed

thereto as the board of directors shall determine; and in particular, such shares may be issued with a preferential [fol. 211] or qualified right to dividends and with a special or without any right of voting, unless the limitation of voting powers is expressly prohibited or restricted by law, and then such stock shall be given voting power only to the extent expressly required by law, and only so long as such restrictive law or laws shall not have been repealed and shall continue to be in full force and effect. In the event of any increase in the capital stock of the consolidated corporation, the shares of the additional stock need not be offered in the first instance to the stockholders of the consolidated corporation in proportion to the number of shares of the capital stock of the consolidated corporation then held by them or at all, and such stockholders shall have no prior or pre-emptive right to subscribe for such increased or additional stock, and the increased or additional stock may be disposed of by the board of directors of the consolidated corporation to such person or persons, for such price or prices, in such manner, and on such terms and conditions as in their absolute judgment and discretion they may see fit.

Article XII

To the extent permitted respectively by the laws of the United States and by the laws of the several States and of foreign countries in which it may do business, said consolidated corporation shall have power to acquire by construction, purchase, lease, or otherwise, other railroads and properties, and to consolidate with and sell or lease its properties to other railroad corporations or other persons or companies; to purchase, acquire, hold and dispose of the stocks, bonds, notes and other evidences of indebtedness of [fol. 212] any corporation, domestic or foreign, including shares of its own capital stock, and its own bonds or other evidences of indebtedness, for such amounts, and upon such terms, as the board of directors may deem to be to said corporation's best interests, and to issue in exchange therefor its stock, bonds, notes and other obligations; to construct, maintain, own, lease and operate railroads and tramways to be worked by electricity, gas, gasoline, or any other motive power, as well as by steam, pneumatic tubes, pipe lines and other devices for the transmission and delivery of

mails and parcels and other articles, and of freight and passengers; to own, lease, and operate express lines; to construct, maintain, own, lease and operate station houses, depots, warehouses, icehouses and icing plants, terminals, aviation fields or landing places both on land and water, terminal and office buildings, docks, piers, wharves, grain elevators, transfers between rail and water, and other terminal facilities, ferries, hotels, restaurants, theatres and other places of amusement or recreation, parks, gardens, pavilions, steamboats and other vessels, wagons, automobiles, tractors, trailers, trucks, aeroplanes and other aircraft, hoists, and other means or adjuncts of transportation, and to conduct a general transportation business by land, by water, and by air, in all its branches; to construct, maintain, own, lease and operate telegraphs and telephones, both wire and wireless, to make, generate, sell, distribute and supply heat, gas and electricity, or any other power, energy, or source of power or energy, for lighting, heating, manufacturing, mechanical, or other purposes, and to conduct a general telegraph, telephone, gas and electrical busi- [fol. 213] ness, or any or all of them, in any or all their branches; to build, purchase, equip, maintain, own, lease, sell and operate cars, engines, derricks, pile drivers and other railway equipments, and to acquire real estate, personal property, licenses, and letters patent covering improvements and novelties necessary to and connected with said business, and to license individuals and corporations to manufacture, sell or use such cars, engines, equipments, improvements, and novelties, in shops or specific territory, upon royalty or otherwise; to exercise the right of eminent domain; to purchase, sell, lease, own and operate all classes of real estate, except where expressly prohibited by law; to lay out town sites and to construct any and all kinds of improvements thereon, or to be used in connection therewith, and to purchase, sell, hold, control and operate easements, franchises, roads, rights-of-way, mill and furnace sites, and to construct and operate power plants, to buy, own, construct, build, erect, maintain, lease, sell or otherwise dispose of plants for the manufacture and repair of engines, motors, dynamos, cars, trucks, rolling stock of all kinds, machinery, mechanical devices of every kind and nature; to buy and sell all kinds of property, both personal and real, except where expressly prohibited by law, and to

act as agent, trustee or in any other fiduciary capacity, to borrow money, issue bonds, promissory notes and other evidences of indebtedness; to own, buy mortgage, hypothecate, pledge, sell or otherwise dispose of and deal in and with property of all kinds, and to vote any shares of capital stock or interest owned by it, the same as a natural person might do; and to enter into such agreements, contracts and [fol 214] stipulations and make such arrangements as may be or seem necessary to carry out the same and attain the objects and purposes herein expressed and intended.

The said consolidated corporation may conduct its business in other states, territories and possessions of the United States, and in foreign countries, and may have one office, or more than one office, and keep the books of the company outside of the states in which it is incorporated, except as may be otherwise provided by law, and may own, purchase, mortgage and convey real and personal property, either in or out of the states in which it is incorporated and in any part of the world, but always subject to local laws.

The foregoing enumeration shall not be deemed to exclude any other effects, rights or privileges provided by law as incident to or resulting from any such consolidation, and not herein specifically mentioned.

Article XIII

Such merger and consolidation shall take effect and the said consolidated corporation shall go into operation when and so soon as this agreement and articles of consolidation shall have been duly executed and shall have been adopted by the stockholders of the respective constituent companies in the manner prescribed by law and the fact of such adoption shall have been certified hereupon by the secretaries of said constitutent companies under the seals thereof as required by law, and this agreement so adopted and so certified, or a copy thereof, shall have been filed in the offices of the secretaries of state of the States of Illinois, Indiana, [fol. 215] New York, Ohio and Pennsylvania, and, if required, in the office of the recorder of the various counties of the State of Illinois, in which the lines of the constitutent railroads are situated, and in the office of the clerk of Erie County, New York, and thereupon and

thereafter all the railroads, estates and property, real, personal and mixed, and all fixtures, rights, privileges, franchises, easements, terms and parts of terms, agreements, covenants, contracts, tariffs and obligations, and all property of every description, name and nature, held, owned, or occupied by or belonging to the constitutent companies aforesaid, or any of them, shall be and become and be vested in and be thereafter owned, used and enjoyed by said consolidated corporation, without any further deed, transfer or conveyance and as fully and effectually to all intents and purposes as the same are now held by each of the said constituent companies respectively. And the board of directors of said consolidated corporation shall have full power to carry said merger and consolidation into effect by all acts necessary or proper for such purpose.

The foregoing enumeration shall not be deemed to exclude any other effects, rights or privileges provided by law as incident to or resulting from any such consolidation and not herein specifically mentioned.

Article XIV

The existence of the consolidated corporation shall be perpetual, or in the event that such perpetual existence may be prohibited by the laws of any of the States in which [fol. 216] it is incorporated, then to the extent limited by such laws its existence shall extend to the greatest time which such laws permit.

In witness whereof, each of the said constituent companies has caused these presents to be signed by its president or vice-president and its corporate seal to be hereunto affixed, and a majority of the directors of each of said constituent companies have hereunto set their hands, this 28th day of December, nineteen hundred and twenty-two.

The New York, Chicago and St. Louis Railroad Company, by J. J. Bernet, President; O. P. Van Sweringen, M. J. Van Sweringen, Otto Miller, J. R. Nutt, C. L. Bradley, C. E. Denney, E. W. Moore, J. J. Bernet, W. A. Colston, J. A. House, F. H. Ginn, Jno. Sherwin, as Directors of the New York, Chicago and St. Louis Railroad Company. Attest: W. D. Turner, Secretary. (Corporate Seal.)

Signed, sealed and delivered as to The New York, Chi-
[fol. 217] cago and St. Louis Railroad Company in the presence of W. D. Turner, Eugene M. Smith, William F. West.

The Chicago and State Line Railroad Company, by W. H. Canniff, President; W. H. Canniff, O. P. Van Sweringen, M. J. Van Sweringen, W. A. Colston, S. C. Murray, C. A. Reinwald, H. N. Williams, as Directors of the Chicago and State Line Railroad Company. Attest: W. A. Colston, Secretary. (Corporate Seal.)

Signed, sealed and delivered as to The Chicago and State Line Railroad Company in the presence of William F. West, Eugene M. Smith, W. A. Colston.

[fol. 218] The Lake Erie and Western Railroad Company, by J. J. Bernet, President; O. P. Van Sweringen, M. J. Van Sweringen, J. J. Bernet, W. A. Colston, J. R. Nutt, Jno. Sherwin, Otto Miller, C. L. Bradley, Ralph Van Vechten, as Directors of The Lake Erie and Western Railroad Company. Attest: C. C. Collister, Secretary. (Corporate Seal.)

Signed, sealed and delivered as to The Lake Erie and Western Railroad Company in the presence of William F. West, Eugene M. Smith, C. C. Collister.

[fol. 219] Fort Wayne, Cincinnati and Louisville Railroad Company, by M. J. Van Sweringen, President; O. P. Van Sweringen, M. J. Van Sweringen, J. J. Bernet, W. A. Colston, J. R. Nutt, Jno. Sherwin, Otto Miller, C. L. Bradley, Ralph Van Vechten, as Directors of Fort Wayne, Cincinnati and Louisville Railroad Company. Attest: C. C. Collister, Secretary. (Corporate Seal.)

Signed, sealed and delivered as to Fort Wayne, Cincinnati and Louisville Railroad Company in the presence of William F. West, Eugene M. Smith, C. C. Collister.

[fol. 220] Toledo, St. Louis and Western Railroad Company, by W. L. Ross, President; O. P. Van Sweringen, W. L. Ross, J. J. Bernet, M. J. Van Sweringen, W. A. Colston, George S. Ross, Walter A. Eversman, Otto Miller, C. L. Bradley, J. R. Nutt, Jno. Sherwin, as Directors of Toledo, St. Louis and Western Railroad Company. Attest: George S. Ross, Secretary. (Corporate Seal.)

Signed, sealed and delivered as to Toledo, St. Louis and Western Railroad Company in the presence of William F. West, Eugene M. Smith, George S. Ross.

State of Ohio,
Cuyahoga County, ss:

I, William F. West, a notary public in and for said County and State, do hereby certify that on the 28th day of December, A. D. 1922, before me personally came J. J. Bernet, [fol. 221] President of The New York, Chicago and St. Louis Railroad Company, one of the constituent corporations described in and which executed the foregoing agreement and articles of consolidation, to me personally known and known to me to be the same person whose name is subscribed to the foregoing instrument as such President and to be such President, and he acknowledged that he signed, sealed and delivered the foregoing instrument as the free and voluntary act of said corporation, and as his own free and voluntary act as such President, for the uses and purposes therein set forth; and the said J. J. Bernet, being further duly sworn, did depose and say that he resides at Cleveland Heights, Ohio; that he is President of The New York, Chicago and St. Louis Railroad Company and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and was affixed thereto by the authority of the board of directors of said corporation, and that he signed his name thereto as President by like authority;

And, on the same day, before me personally came W. D. Turner, to me known, who being by me duly sworn according to law, on his oath did depose and say that he resides at Shaker Heights, Ohio; that he is Secretary of The New York, Chicago and St. Louis Railroad Company, one of the constituent corporations described in and which executed the foregoing instrument; that he was personally present and did see the corporate seal of said corporation affixed to the foregoing instrument; that the seal so affixed is the corporate seal of said corporation, and was so affixed by authority of said corporation as the free act and deed [fol. 222] thereof; that the above named J. J. Bernet is President of The New York, Chicago and St. Louis Railroad Company; that this deponent was present and saw the said J. J. Bernet as such President sign the said instrument and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of The New York, Chicago and St. Louis Railroad Company by its authority, and by authority of its board of directors, and that this deponent signed his name thereto at the same time as a subscribing witness, and that the name of this deponent above signed in attestation of the due execution of said instrument is of this deponent's own proper handwriting.

W. D. Turner.

Certified to by, and subscribed and sworn to before me, this 28th day of December, 1922. William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

State of Ohio,
Cuyahoga County, ss:

On this 28th day of December, 1922, before me the subscriber, a notary public in and for said County and State, personally appeared O. P. Van Swearingen, M. J. Van Sweringen, Otto Miller, J. R. Nutt, C. L. Bradley, C. E. Denney, E. W. Moore, J. J. Bernet, W. A. Colston, J. A. House, F. H. Ginn and John Sherwin, a majority of the board of directors of The New York, Chicago and St. Louis Railroad Company, to me personally known and known to me to be the same persons described in, and whose names are subscribed to, and who severally executed, the fore-

going agreement and articles of consolidation as directors [fol. 223] of said company and, being by me each duly and severally sworn, each for himself says that he is a director of The New York, Chicago and St. Louis Railroad Company, the constituent company herein named; that he executed the foregoing instrument as his free and voluntary act and deed as such director; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was thereto affixed by order of the board of directors of said company.

In witness whereof, I have hereunto set my hand and official seal the day and year above written.

William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

STATE OF OHIO,
Cuyahoga County, ss:

I, William F. West, a notary public in and for said County and State, do hereby certify that on the 28th day of December A. D. 1922, before me personally came W. H. Canniff, President of The Chicago and State Line Railroad Company, one of the constituent companies described in and which executed the foregoing agreement and articles of consolidation, to me personally known, and known to me to be the same person whose name is subscribed to the foregoing instrument as such President and to be such President, and he acknowledged that he signed, sealed and delivered the foregoing instrument as the free and voluntary act of said corporation and as his own free and voluntary act as such President, for the uses and purposes [fol. 224] therein set forth; and the said W. H. Canniff, President, being further duly sworn, did depose and say that he resides at Cleveland, Ohio; that he is President of The Chicago and State Line Railroad Company and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and was affixed thereto by authority of the board of directors of said corporation, and that he signed his name thereto as President by like authority;

And, on the same day, before me personally came W. A. Colston, to me known, who being by me duly sworn ac-

cording to law, on his oath did depose and say that he resides at Cleveland, Ohio; that he is Secretary of The Chicago and State Line Railroad Company, one of the constituent companies described in and which executed the foregoing instrument; that he was personally present and did see the corporate seal of said corporation affixed to the foregoing instrument; that the seal so affixed is the corporate seal of said corporation, and was so affixed by authority of said corporation as the free act and deed thereof; that the above named W. H. Canniff is President of The Chicago and State Line Railroad Company; that this deponent was present and saw the said W. H. Canniff as such President, sign the said instrument and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of The Chicago and State Line Railroad Company by its authority and by authority of its board of directors, and that this deponent signed his name thereto at the same time as a subscribing witness and that the name of this deponent above signed in attestation of the [fol. 225] due execution of said instrument is of this deponent's own proper handwriting.

W. A. Colston.

Certified to by, and subscribed and sworn to before me, this 28th day of December, 1922. William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

State of Ohio,
Cuyahoga County, ss:

On this 28th day of December, 1922, before me the subscriber, a notary public in and for said County and State, personally appeared W. H. Canniff, O. P. Van Sweringen, M. J. Van Sweringen, W. A. Colston, S. C. Murray, C. A. Reinwald and H. N. Williams, a majority of the board of directors of The Chicago and State Line Railroad Company, to me personally known and known to me to be the same persons described in and whose names are subscribed to, and who severally executed the foregoing instrument and articles of consolidation as directors of said company, and, being *my* me each duly and severally sworn, each for himself, says that he is a director of The Chicago and State

Line Railroad Company, the constituent company therein named; that he executed the foregoing instrument as his free and voluntary act and deed as such director; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was thereto affixed by order of the board of directors of said company.

[fol. 226] In witness whereof, I have hereunto set my hand and official seal the day and year above written.

William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

STATE OF OHIO,
Cuyahoga County, ss:

I, William F. West, a notary public in and for said County and State, do hereby certify that on the 28th day of December A. D. 1922, before me personally came J. J. Bernet, President of The Lake Erie and Western Railroad Company, one of the constituent companies described in and which executed the foregoing agreement and articles of consolidation, to me personally known and known to me to be the same person whose name is subscribed to the foregoing instrument as such President and to be such President, and he acknowledged that he signed, sealed and delivered the foregoing instrument as the free and voluntary act of said corporation, and as his own free and voluntary act as such President, for the uses and purposes therein set forth; and the said J. J. Bernet, being further duly sworn, did depose and say that he resides at Cleveland Heights, Ohio; that he is President of The Lake Erie and Western Railroad Company and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and was affixed thereto by the authority of the board of directors of said corporation and that he signed his name thereto as President by like authority;

And, on the same day, before me personally came C. C. Collister, to me known, who being by me duly sworn accord-
[fol. 227] ing to law, on his oath did depose and say that he resides at Cleveland Heights, Ohio; that he is Secretary of The Lake Erie and Western Railroad Company, one of the

constituent companies described in and which executed the foregoing instrument; that he was personally present and did see the corporate seal of said corporation affixed to the foregoing instrument; that the seal so affixed is the corporate seal of said corporation and was so affixed by authority of such corporation as the free act and deed thereof; that the above named J. J. Bernet is President of The Lake Erie and Western Railroad Company; that this deponent was present and saw the said J. J. Bernet as such President sign the said instrument and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of The Lake Erie and Western Railroad Company by its authority, and by authority of its board of directors, and that this deponent signed his name thereto at the same time as a subscribing witness, and that the name of this deponent above signed in attestation of the due execution of said instrument is of this deponent's own proper handwriting.

C. C. Collister.

Certified to by, and subscribed and sworn to before me, this 28th day of December, 1922. William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

STATE OF OHIO,
Cuyahoga County, ss:

On this 28th day of December, 1922, before me the subscriber, a notary public in and for said County and State, [fol. 228] personally appeared O. P. Van Sweringen, M. J. Van Sweringen, J. J. Bernet, W. A. Colston, J. R. Nutt, John Sherwin, Otto Miller, C. L. Bradley and Ralph Van Vechten, a majority of the board of directors of The Lake Erie and Western Railroad Company, to me personally known and known to me to be the same persons described in, and whose names are subscribed to, and who severally executed, the foregoing agreement and articles of consolidation as directors of said company and, being by me each duly and severally sworn, each for himself, says that he is a director of The Lake Erie and Western Railroad Company, the constituent company therein named; that he executed the foregoing instrument as his free and voluntary

act and deed as such director; that he knows the corporate seal of said company, that the seal affixed to the foregoing instrument is such corporate seal, and that it was thereto affixed by order of the board of directors of said company.

In witness whereof, I have hereunto set my hand and official seal the day and year above written.

William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

STATE OF OHIO,
Cuyahoga County, ss:

I, William F. West, a notary public in and for said County and State, do hereby certify that on the 28th day of December, A. D. 1922, before me personally came M. J. Van Sweringen, President of Fort Wayne, Cincinnati and Louisville Railroad Company, one of the constituent com- [fol. 229] panies described in and which executed the foregoing agreement and articles of consolidation, to me personally known, and known to me to be the same person whose name is subscribed to the foregoing instrument as such President and to be such President, and he acknowledged that he signed, sealed and delivered the foregoing instrument as the free and voluntary act of said corporation, and as his own free and voluntary act as such President, for the uses and purposes therein set forth; and the said M. J. Van Sweringen, being further duly sworn, did depose and say that he resides at Shaker Heights, Ohio; that he is President of Fort Wayne, Cincinnati and Louisville Railroad Company and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the complete seal of said corporation, and was affixed thereto by the authority of the board of directors of said corporation, and that he signed his name thereto as President by like authority;

And, on the same day, before me personally came C. C. Collister, to me known, who being by me duly sworn according to law, on his oath did depose and say that he resides at Cleveland Heights, Ohio; that he is Secretary of Fort Wayne, Cincinnati and Louisville Railroad Company, one of the constituent companies described in and which executed the foregoing instrument; that he was personally

present and did see the corporate seal of said corporation affixed to the foregoing instrument; that the seal so affixed is the corporate seal of said corporation, and was so affixed by authority of said corporation as the free act and deed thereof; that the above named M. J. Van Sweringen is [fol. 230] President of Fort Wayne, Cincinnati and Louisville Railroad Company; that this deponent was present and saw the said M. J. Van Sweringen as such President sign the said instrument, and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of Fort Wayne, Cincinnati, and Louisville Railroad Company by its authority and by authority of its board of directors, and that this deponent signed his name thereto at the same time as a subscribing witness and that the name of this deponent above signed in attestation of the due execution of said instrument is of this deponent's own proper handwriting.

C. C. Collister.

Certified to by, and subscribed and sworn to before me, this 28th day of December, 1922. William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

STATE OF OHIO,
Cuyahoga County, ss:

On this 28th day of December, 1922, before me the subscriber, a notary public in and for said County and State, personally appeared O. P. Van Sweringen, M. J. Van Sweringen, J. J. Bernet, W. A. Colston, J. R. Nutt, John Sherwin, Otto Miller, C. L. Bradley and Ralph Van Vechten, a majority of the board of directors of Fort Wayne, Cincinnati and Louisville Railroad Company, to me personally known and known to me to be the same persons described in, and whose names are subscribed to, and who severally executed the foregoing agreement and articles of consolidation as directors of said company and, being by [fol. 231] me each duly and severally sworn, each for himself says that he is a director of Fort Wayne, Cincinnati and Louisville Railroad Company, the constituent company therein named; that he executed the foregoing instrument as his free and voluntary act and deed as such director;

that he knows the corporate seal of said company, that the seal affixed to the foregoing instrument is such corporate seal, and that it was thereto affixed by order of the board of directors of said company.

In Witness Whereof, I have hereunto set my hand and official seal the day and year above written.

William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

STATE OF OHIO,
Cuyahoga County, ss:

I, William F. West, a notary public in and for said County and State, do hereby certify that on the 28th day of December, A. D. 1922, before me personally came Walter L. Ross, President of Toledo, St. Louis and Western Railroad Company, one of the constituent companies described in and which executed the foregoing agreement and articles of consolidation, to me personally known, and known to me to be the same person whose name is subscribed to the foregoing instrument as such President and to be such President, and he acknowledged that he signed, sealed and delivered the foregoing instrument as the free and voluntary act of said corporation, and as his own free and voluntary act as such President, for the uses and purposes therein set forth; and the said Walter L. Ross, being further duly [fol. 232] sworn, did depose and say that he resides at Toledo, Ohio; that he is President of Toledo, St. Louis and Western Railroad Company and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and was affixed thereto by the authority of the board of directors of said corporation, and that he signed his name thereto as President by like authority;

And, on the same day, before me personally came George S. Ross, to me known, who being by me duly sworn according to law, on his oath did depose and say that he resides at Toledo, Ohio; that he is Secretary of Toledo, St. Louis and Western Railroad Company, one of the constituent companies described in and which executed the foregoing

instrument; that he was personally present and did see the corporate seal of said corporation affixed to the foregoing instrument; that the seal so affixed is the corporate seal of said corporation, and was so affixed by authority of said corporation as the free act and deed thereof; that the above named Walter L. Ross is President of Toledo, St. Louis and Western Railroad Company; that this deponent was present and saw the said Walter L. Ross as such President sign the said instrument, and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of Toledo, St. Louis and Western Railroad Company by its authority and by authority of its board of directors, and that this deponent signed his name thereto at the same time as a subscribing witness and that the name of this deponent above signed in attestation [fol. 233] of the due execution of said instrument is of this deponent's own proper handwriting.

George S. Ross.

Certified to by, and subscribed and sworn to before me, this 28th day of December, 1922. William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

State of Ohio,
Cuyahoga County, ss:

I, William F. West, a notary public in and for said County and State, do hereby certify that on the 28th day of December, A. D. 1922, before me personally came O. P. Van Sweringen, Walter L. Ross, J. J. Bernet, M. J. Van Sweringen, W. A. Colston, George S. Ross, W. A. Eversman, Otto Miller, C. L. Bradley, J. R. Nutt and John Sherwin, a majority of the board of directors of Toledo, St. Louis and Western Railroad Company, to me personally known and known to me to be the same persons mentioned and described in, and who executed the foregoing agreement and articles of consolidation as directors of said company, and severally acknowledged that they executed the same; that they, being by me each duly and severally sworn, each for himself says that he is a director of Toledo, St. Louis and Western Railroad Company, the constituent company therein named; that he knows the corporate seal of said

company, that the seal affixed to the foregoing instrument is such corporate seal, and that it was thereto affixed by order of the board of directors of said company.

[fol. 234] In Witness Whereof, I have hereunto set my hand and official seal the day and year above written.

William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

State of Ohio,
Cuyahoga County, ss:

I, George Wallace, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid,

Do Hereby Certify That William F. West before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof a Notary Public in and for said County, duly authorized by the laws of Ohio to take the same, also to take acknowledgments, affidavits and proofs of deeds or conveyances for land, tenements, hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

Commission expires January 17, 1924.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at Cleveland, this 5th day of January, A. D. 1923.

No. —.

George Wallace, Clerk. (Notarial Seal.)

I, W. D. Turner, Secretary of The New York, Chicago and St. Louis Railroad Company (meaning thereby the constituent company), a corporation duly organized and existing under the laws of the States of New York, Penn- [fol. 235] sylvania, Ohio and Indiana, do hereby certify under the corporate seal of said company that the annexed agreement and articles of consolidation dated the 28th day of December, 1922, for the merger and consolidation of the said The New York, Chicago and St. Louis Railroad Company with The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, Fort

Wayne, Cincinnati and Louisville Railroad Company, and Toledo, St. Louis and Western Railroad Company into a consolidated corporation to be known as "The New York, Chicago and St. Louis Railroad Company," was submitted to the stockholders of the said The New York, Chicago and St. Louis Railroad Company (meaning the constituent company) at a special meeting of such stockholders called separately and held at the principal office of said company at No. 112 Prospect Avenue, S. E., Cleveland, Ohio, on the 12th day of March, 1923, for the purpose of taking the same into consideration; that due notice of the time and place of holding such meeting and the object thereof was given by said The New York, Chicago and St. Louis Railroad Company (meaning the constituent company) to its stockholders by written or printed notice addressed to each of the persons in whose names the capital stock of said company at the time of giving such notice stood on the books thereof, and that such notice was delivered to said persons respectively, or sent to them by mail, when their post office address was known to said company, at least thirty (30) days before the time of holding such meeting, and that a general notice of the time and place and object of said meeting was published at least once a week for four [fol. 236] (4) weeks successively in the following newspapers, to wit: the Cleveland Plain Dealer, printed in the City of Cleveland, Ohio, where the said The New York, Chicago and St. Louis Railroad Company (meaning the constituent company) then had its principal office or place of business; the Buffalo Commercial, printed in the City of Buffalo, New York, where the said The New York, Chicago and St. Louis Railroad Company (meaning the constituent company) then had its office in the State of New York; and the Dispatch-Herald, printed in the City of Erie, Pennsylvania, where the said The New York, Chicago and St. Louis Railroad Company (meaning the constituent company) then had its office in the State of Pennsylvania; and that a like general notice of the time and place and object of said meeting was published, not less than thirty (30) days previous to the time appointed for such meeting, in the following newspapers published in the counties of the State of Indiana through which the railroad of said company runs, to wit: the News Sentinel, printed in the City

of Fort Wayne, in the County of Allen, Indiana, where said The New York, Chicago and St. Louis Railroad Company (meaning the constituent company) then had its office in the State of Indiana, and in Commercial Mail, Warsaw Times, Plymouth Daily Pilot, Starke County Republican, La Porte Herald, Valparaiso Vidette and Lake County Times, published respectively in the Counties of Whitley, Kosciusko, Marshall, Starke, La Porte, Porter and Lake; that at the said meeting of said stockholders the aforesaid and annexed agreement of the said Directors of said The [fol. 237] New York, Chicago and St. Louis Railroad Company (meaning the constituent company) was considered and a vote taken by ballot for the adoption or rejection of the same, in pursuance of and in conformity to the provisions of the statute in such case made and provided, and said ballots were cast in person or by proxy; that upon said ballot more than two-thirds (⅔) of all the votes of all the stockholders [each share of stock entitling the holder thereof to one (1) vote] were for the adoption of said agreement and articles of consolidation.

In Witness Whereof, I, W. D. Turner, Secretary of The New York, Chicago and St. Louis Railroad Company, have, in pursuance of the provisions of the statute in such case made and provided, certified the above facts upon the said agreement and articles of consolidation, and have hereunto set my hand and affixed the corporate seal of said The New York, Chicago and St. Louis Railroad Company, this 26th day of March, 1923.

W. D. Turner, Secretary. (Corporate Seal.)

State of Ohio,
County of Cuyahoga, ss:

On this 26th day of March, 1923, before me, a Notary Public in and for said County and State, personally came W. D. Turner, to me personally known and being by me duly sworn, did depose and say that he is the Secretary of The New York Chicago and St. Louis Railroad Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing certificate is such seal; that it [fol. 238] was thereto affixed by authority of the Board of

Directors of said Company, and that by like authority he subscribed the same as Secretary of said Company.

William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

I, W. A. Colston, Secretary of The Chicago and State Line Railroad Company, a corporation duly organized and existing under the laws of the State of Illinois, do hereby certify, under the corporate seal of said company, that the annexed agreement and articles of consolidation dated the 28th day of December, 1922, for the merger and consolidation of the said The Chicago and State Line Railroad Company, with The New York, Chicago and St. Louis Railroad Company, The Lake Erie and Western Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company and Toledo, St. Louis and Western Railroad Company, was submitted to the stockholders of the said The Chicago and State Line Railroad Company at a special meeting of such stockholders called separately and held at the office of said company in the City of Chicago, Illinois, on the 13th day of March, 1923, and the 2nd day of April, 1923, for the purpose of taking the same into consideration; that due notice of the time and place of holding such meeting and the object thereof was given by the said The Chicago and State Line Railroad Company to its stockholders by written or printed notice addressed to each of the persons in whose names the capital stock of said company at the time of giving such notice stood on the books thereof, and that such notice was [fol. 239] delivered to said persons respectively, or sent to them by depositing the same in a post office, directed to the post office address of each of said stockholders severally, when such post office address was known to said company, with necessary postage for the transmittal of the same prepaid, at least sixty (60) days before the time of holding such meeting- and that a general notice of the time and place and object of said meeting was published once a week for at least ten (10) successive weeks in the following newspaper, to wit: The Chicago Daily Journal, printed in the City of Chicago, Illinois, where the said The Chicago and State Line Railroad Company then had its principal office, or place of business; that at the said meeting of said stockholders the aforesaid and annexed agreement of the said Directors of said The Chicago and State Line Railroad

Company was considered and a vote taken by ballot for the adoption or rejection of the same, in pursuance of and in conformity to the provisions of the statute in such case made and provided, and said ballots were cast in person or by proxy; that upon said ballot more than two-thirds (⅔) of all the votes of all the stockholders [each share of stock entitling the holder thereof to one (1) vote] were for the adoption of said agreement and articles of consolidation.

In Witness Whereof, I, W. A. Colston, Secretary, of The Chicago and State Line Railroad Company have, in pursuance of the provisions of the statute in such case made and provided, certified the above facts upon the said agreement and articles of consolidation, and have hereunto set my hand and affixed the corporate seal of said The Chicago [fol. 240] and State Line Railroad Company, this 2nd day of April, 1923.

W. A. Colston, Secretary. (Corporate Seal.)

State of Ohio,
County of Cuyahoga, ss:

On this 2nd day of April, 1923, before me, a Notary Public in and for said County and State, personally came W. A. Colston, to me personally known and being by me duly sworn, did depose and say that he is the Secretary of The Chicago and State Line Railroad Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing certificate is such seal; that it was thereto affixed by authority of the Board of Directors of said Company, and that by like authority he subscribed the same as Secretary of said Company.

William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

I, C. C. Collister, Secretary of The Lake Erie and Western Railroad Company, a corporation duly organized and existing under the laws of the State of Illinois, do hereby certify, under the corporate seal of said company, that the annexed agreement and articles of consolidation dated the 28th day of December, 1922, for the merger and consolidation of said The Lake Erie and Western Railroad Company, with The New York, Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company,

and Toledo, St. Louis and Western Railroad Company, was [fol. 241] submitted to the stockholders of the said The Lake Erie and Western Railroad Company at a special meeting of such stockholders called separately and held at the principal office of said company at Peoria, Illinois, on the 14th day of March, 1923, for the purpose of taking the same into consideration; that due notice of the time and place of holding such meeting and the object thereof was given by the said The Lake Erie and Western Railroad Company to its stockholders by written or printed notice addressed to each of the persons in whose names the capital stock of said company at the time of giving such notice stood on the books thereof, and that such notice was delivered to said persons respectively, or sent to them by depositing the same in a post office, directed to the post office address of each of said stockholders severally, when such post office address was known to said company, with necessary postage for the transmittal of the same prepaid, at least sixty (60) days before the time of holding such meeting, and that a general notice of the time and place and object of said meeting was published once a week for at least ten (10) successive weeks in Peoria Evening Star, a newspaper printed in the City of Peoria, Peoria County, Illinois, in which said City and County the principal business office of said company is located; that a like general notice of the time and place and object of said meeting was given by advertising the same at least sixty (60) days prior to the day appointed for such meeting in the following newspapers published in each County of the State of Illinois, through or into which the railroad of said company runs, namely: in Danville Commercial News, published in Vermillion [fol. 242] County; in Paxton Record, published in Ford County; in Bloomington Pantagraph, published in McLean County; in Woodford County Journal, published in Woodford County; in Pekin Daily Times, published in Tazewell County, and in Peoria Evening Star, published in Peoria County; that a like general notice of the time and place and object of said meeting was published at least four weeks prior to such meeting in conformity with the by-laws of said company in The New York Times, a newspaper published in the City of New York; that at the said meeting of said stockholders the aforesaid and annexed agreement of the said Directors of the said The Lake Erie and Western

Railroad Company was considered and a vote taken by ballot for the adoption or rejection of the same, in pursuance of and in conformity to the provisions of the statute in such case made and provided, and said ballots were cast in person or by proxy; that upon said ballot more than two-thirds (⅔) of all the votes of all the stockholders [each share of stock entitling the holder thereof to one (1) vote] were for the adoption of said agreement and articles of consolidation.

In Witness Whereof, I, C. C. Collister, Secretary of The Lake Erie and Western Railroad Company have, in pursuance of the provisions of the statute in such case made and provided, certified the above facts upon the said agreement and articles of consolidation, and have hereunto set my hand and affixed the corporate seal of the said The Lake Erie and Western Railroad Company this 26th day of March, 1923.

C. C. Collister, Secretary. (Corporate Seal.)

[fol. 243] State of Ohio,
County of Cuyahoga, ss:

On this 26th day of March, 1923, before me, a Notary Public in and for said County and State, personally came C. C. Collister, to me personally known and being by me duly sworn, did depose and say that he is the Secretary of The Lake Erie and Western Railroad Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing certificate is such seal; that it was thereto affixed by authority of the Board of Directors of said Company, and that by like authority he subscribed the same as Secretary of said Company.

William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

I, C. C. Collister, Secretary of Fort Wayne, Cincinnati and Louisville Railroad Company, a corporation duly organized and existing under the laws of the State of Indiana, do hereby certify under the corporate seal of said Company that the annexed agreement and articles of consolidation dated the 28th day of December, 1922, for the merger and consolidation of the said Fort Wayne, Cincinnati and Louisville Railroad Company with The New York,

Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company and Toledo, St. Louis and Western Railroad Company into a consolidated corporation to be known as "The New York, Chicago and St. Louis Railroad Company," was submitted to the stockholders of the said Fort Wayne, Cincinnati and Louisvillle Railroad [fol. 244] Company at a special meeting of such stockholders called separately and held at the office of said company in the City of Muncie, Indiana, on the 15th day of March, 1923, for the purpose of taking the same into consideration; that due notice of the time and place of holding such meeting and the object thereof was given by the said Fort Wayne, Cincinnati and Louisville Railroad Company to its stockholders by written or printed notices addressed to each of the persons in whose names the capital stock of said company at the time of giving such notice stood on the books thereof; and that such notice was delivered to such persons respectively or sent to them by mail, when their post office address was known to said company, at least thirty (30) days before the time of holding such meeting; and that a general notice of the time and place and object of said meeting was published at least thirty (30) days previous to the time appointed for such meeting in the following newspaper, to wit: The New Castle Courier, printed in the City of New Castle, in the County of Henry, Indiana (the County of Henry being one of the counties through which the railroad of said company runs, and none of the stockholders of said company residing in any other of the counties of said State of Indiana through which the road of said company runs); that at the said meeting of said stockholders the aforesaid and annexed agreement of the said directors of the said Fort Wayne, Cincinnati and Louisville Railroad Company was considered, and a vote taken by ballot for the adoption or rejection of the same, in pursuance of and in conformity to the provisions of the [fol. 245] statute in such case made and provided, and said ballots were cast in person or by proxy; and that upon said ballot more than two-thirds (⅔) of all the votes of all the stockholders (each share of stock entitling the holder thereof to one vote) were for the adoption of said agreement and articles of consolidation.

In Witness Whereof, I, C. C. Collister, Secretary of Fort Wayne, Cincinnati and Louisville Railroad Company, have, in pursuance of the provisions of the statute in such case made and provided, certified the above facts upon the said agreement and articles of consolidation, and have hereunto set my hand and affixed the corporate seal of the said Fort Wayne, Cincinnati and Louisville Railroad Company this 26th day of March, 1923.

C. C. Collister, Secretary. (Corporate Seal.)

STATE OF OHIO,
County of Cuyahoga, ss:

On this 26th day of March, 1923, before me, a Notary Public in and for said County and State, personally came C. C. Collister, to me personally known and being by me duly sworn, did depose and say that he is the Secretary of Fort Wayne, Cincinnati and Louisville Railroad Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing certificate is such seal; that it was thereto affixed by authority of the board of directors of said company, and that by like authority he subscribed the same as Secretary of said company.

William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

[fol. 246] I, George S. Ross, Secretary of Toledo, St. Louis and Western Railroad Company, a corporation duly organized and existing under the laws of the State of Indiana, do hereby certify, under the corporate seal of said company, that the annexed agreement and articles of consolidation dated the 28th day of December, 1922, for the merger and consolidation of the said Toledo, St. Louis and Western Railroad Company with The New York, Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, and Fort Wayne, Cincinnati and Louisville Railroad Company, was submitted to the stockholders of the said Toledo, St. Louis and Western Railroad Company at a special meeting of such stockholders called separately and held at the office of said company in Frankfort, Indiana, on the 16th day of March, 1923, for the purpose of taking the same into consideration; that due notice of the

time and place of holding such meeting and the object thereof was given by the said Toledo, St. Louis and Western Railroad Company to its stockholders by written or printed notice addressed to each of the persons in whose names the capital stock of said company at the time of giving such notice stood on the books thereof, and that such notice was delivered to said persons respectively, or sent to them by mail, when their post-office address was known to said company, at least thirty (30) days before the time of holding such meeting, and that a general notice of the time and place and object of said meeting was published not less than thirty (30) days previous to the date [fol. 247] of such meeting in the newspapers hereinafter specified published in each of the counties of the State of Indiana hereinafter named, through which the road of said company runs, to wit: Decatur Daily Democrat, published in Adams County; Bluffton Banner, published in Wells County; Warren Tribune, published in Huntington County; Marion Leader Tribune, published in Grant County; Kokomo Tribune, published in Howard County; Frankfort Morning Times, published in Clinton County; La Fayette Journal Courier, published in Tippecanoe County; Crawfordsville Journal, published in Montgomery County; Attica Ledger Tribune, published in Fountain County; Cayuga Herald, published in Vermilion County, and Rockville Republican, published in Parke County; that a like general notice of the time, place and object of said meeting was published not less than thirty (30) days previous to the time appointed for such meeting, in conformity with the by-laws of said company, in The New York Times, a newspaper printed in the City of New York; that at the said meeting of said stockholders the aforesaid and annexed agreement of the said Directors of the said Toledo, St. Louis & Western Railroad Company was considered and a vote taken by ballot for the adoption or rejection of the same, in pursuance of and in conformity to the provisions of the statute in such case made and provided, and said ballots were cast in person or by proxy; that upon said ballot more than two-third (⅔) of all the votes of all the stockholders [each share of stock entitling the holder thereof to one (1) vote] were for the adoption of said agreement and articles of consideration.

[fol. 248] In Witness Whereof, I, George S. Ross, Secretary of Toledo, St. Louis and Western Railroad Company, have, in pursuance of the provisions of the statute in such case made and provided, certified the above facts upon the said agreement and articles of consolidation, and have hereunto set my hand and affixed the corporate seal of the said Toledo, St. Louis and Western Railroad Company this 26th day of March, 1923.

George S. Ross, Secretary. (Corporate Seal.)

State of Ohio,
County of Cuyahoga, ss:

On this 26th day of March, 1923, before me, a Notary Public in and for said County and State, personally came George S. Ross, to me personally known and being by me duly sworn, did depose and say that he is the Secretary of Toledo, St. Louis & Western Railroad Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing certificate is such seal; that it was thereto affixed by authority of the Board of Directors of said Company, and that by like authority he subscribed the same as Secretary of said Company.

William F. West, Notary Public. My commission expires January 17, 1924. (Notarial Seal.)

The State of Ohio,
Cuyahoga County, ss:

I, George Wallace, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid, do hereby certify that William F. West, before whom the an-
[fol. 249] nexed acknowledgments, oaths, affidavits were taken, was at the date thereof a notary public in and for said county, duly authorized by the laws of Ohio to take the same, also to take acknowledgments, affidavits and proofs of deeds or conveyances for land, tenements or hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at Cleveland, this 2nd day of April, A. D. 1923.

Commission expires January 17, 1924.

George Wallace, Clerk. J. A. Baker, Dep. (Court Seal.)

STATE OF NEW YORK,
Office of Secretary of State, ss:

I have compared the preceding with the original agreement and articles of consolidation of The New York, Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company and Toledo, St. Louis and Western Railroad Company, forming a consolidated corporation known as "The New York, Chicago and St. Louis Railroad Company," with the various certificates and affidavits thereto annexed, filed and recorded in this office on the — day of ——, 1923, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

[fol. 250] Witness my hand and the seal of office of the Secretary of State, at the City of Albany, this — day of ——, 1923.

—— ——, Secretary of State.

PENNSYLVANIA, ss:

Office of the Secretary of the Commonwealth, Harrisburg

—— —, 1923.

I do hereby certify that the foregoing and annexed is a full, true and correct copy of the agreement and articles of consolidation of The New York, Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company, and Toledo, St. Louis and Western Railroad Company into one corporation to be known as The New York, Chicago and St. Louis Railroad Company so full and entire as the same remains on file in this office.

In testimony whereof, I have hereunto set my hand and caused the seal of the Secretary's office to be affixed the day and year above written.

—— ——, Secretary of the Commonwealth.

UNITED STATES OF AMERICA, OHIO,
Office of the Secretary of State, ss:

I, Thad H. Brown, Secretary of State of the State of Ohio, having the custody of the great seal of the said state, do hereby certify that the foregoing is a copy, carefully compared by me with the original now in my official cus-[fol. 251] tody, as Secretary of State, and found to be true and correct, of the agreement and articles of consolidation of The New York, Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company, and Toledo, St. Louis and Western Railroad Company into one corporation to be known as "The New York, Chicago and St. Louis Railroad Company," filed in this office on the 11th day of April, A. D. 1923, and recorded in Volume 294 of the Records of Incorporations.

In testimony whereof, I have hereunto subscribed my name and affixed the great seal of the State of Ohio at Columbus, this 11th day of April, A. D. 1923.

Thad H. Brown, Secretary of State. (Seal.)

Certificate

STATE OF INDIANA,
Office of the Secretary of State, ss:

I, —— ——, Secretary of State of the State of Indiana, do hereby certify that the annexed and foregoing is a full, true and complete copy of the agreement and articles of consolidation of The New York, Chicago and St. Louis Railroad Company. The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company and Toledo, St. Louis and Western Railroad Company into one corporation to be known as The New York, Chicago and St. Louis Railroad Company as the same appears of record in this office.

[fol. 252] In witness whereof, I have hereunto set my hand and affixed the seal of the State of Indiana at the City of Indianapolis, this — day of ——, A. D. 1923.

—— ——, Secretary of State.

Certificate No. —.

STATE OF ILLINOIS:

Office of the Secretary of State

To all to whom these presents shall come, Greeting:

I, —— ——, Secretary of State of the State of Illinois, do hereby certify that the foregoing and hereto attached is a true copy of the agreement and articles of consolidation of The New York, Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company, and Toledo, St. Louis and Western Railroad Company into one corporation to be known as The New York, Chicago and St. Louis Railroad Company, the original of which agreement is now on file and a matter of record in this office.

In testimony whereof, I hereto set my hand and cause to be affixed the great seal of the State of Illinois. Done at the City of Springfield, this — day of ——, A. D. 1923.

—— ——, Secretary of State.

[fol. 253] Mr. Hocker: One of them is the articles of agreement of consolidation of railroads, and the other is the order of the Interstate Commerce Commission with respect thereto.

(Thereupon, the reporter marked said papers "Defendant's Exhibit No. 2.")

Said Defendant's Exhibit No. 2 is in words and figures as follows:

DEFENDANT'S EXHIBIT No. 2

Certificate and Order

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 18th Day of June, A. D. 1923

Finance Docket No. 2919

Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company

In the Matter of the Application of THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY for a Certificate of Public Convenience and Necessity Authorizing Acquisition and Operation of Certain Lines of Railroad and for Authority to Issue Capital Stock

A hearing and investigation of the matters and things involved in these proceedings having been had and said Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified that the present and future public convenience and necessity require and will require the [fol. 254] acquisition and operation by The New York, Chicago & St. Louis Railroad Company, a consolidated corporation of the States of New York, Pennsyvania, Ohio, Indiana and Illinois, of the lines of railroad described in said application and report.

It is ordered, That The New York, Chicago & St. Louis Railroad Company aforesaid be and it is hereby authorized as follows:

(a) To issue 327,200 shares of 6% preferred stock, Series A, and 462,479 shares of common stock in exchange for all of the issued capital stock of five constituent companies of the applicant;

(b) To pledge a part of said stock to be issued, namely, 8,000 shares of preferred stock and 7,000 shares of common stock, in substitution for stock of said The Chicago and State Line Railroad Company now held by the Trustee as security under the Second and Improvement Mortgage of The New York, Chicago & St. Louis Railroad Company, one of the constituent companies, and to sell said stock if and when it shall be released from said pledge or from the lien of said mortgage;

(c) To sell at the best price obtainable, subject to any existing trusts, such part of said stock as shall be issued in lieu of that part of the stock of The New York, Chicago & St. Louis Railroad Company, one of the constituent companies, and of said Toledo, St. Louis and Western Railroad Company, now held in their respective treasuries, the proceeds to be used for the corporate purposes of the applicant;

(d) To sell from time to time, at the best price obtainable, any part of said stock to be issued and contributed by the holders thereof to the consolidated corporation as fully [fol. 255] paid treasury stock and to use the proceeds from any such sales for the corporate purposes of the applicant;

(e) In cases where outstanding shares of stock of any of the constituent companies have been or may be purchased by any of the constituent companies from dissenting stockholders or others pursuant to the requirements of the laws of any of the states under which the applicant is organized, or in furtherance of the consolidation, to exchange for said stock so purchased stock of the applicant and, after the contribution of said stock of the consolidated corporation to the applicant as required by the consolidation agreement, to sell from time to time as fully paid treasury stock the stock so received, at the best price obtainable, and to use the proceeds for the corporate purposes of the applicant;

(f) To issue certificates of ownership for fractions of shares of stock to the extent necessary to effect the proposed transactions:

Provided, and upon condition, however, that of the stock authorized to be sold the preferred shall be sold at not less than 90 per cent of par, and the common at not less than

85 per cent of par, and that the proceeds of such sale shall not be used otherwise than in furtherance of the adjustments incident to the consolidation and for other capital purposes.

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless and until so ordered by this Commission.

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the [fol. 256] Commission's order, dated May 25, 1922, respecting application filed under section 20a of the Interstate Commerce Act.

It is further ordered, That nothing herein shall be construed to imply any guarantee or obligation as to said stock or dividends or interest thereon on the part of the United States.

By the Commission.

George B. McGinty, Secretary. (Seal.)

A. W. DANIELS, of lawful age, was thereupon called as a witness and, being first duly sworn by the clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Hocker:

Q. What is your name?
A. A. W. Daniels.
Q. Where do you live?
A. In Venice.
Q. And are you a railroad man?
A. Yes, sir.
Q. Engineer?
A. Yes, sir.
Q. And are you employed by those consolidated railroads which you boys call the Nickel Plate?
A. Yes, sir.
Q. New York, Chicago & St. Louis Railroad Company?
A. Yes, sir.

Q. Used to be the Clover Leaf, or the St. Louis, Toledo and Western?

A. Yes, sir.

Q. Then that was in the hands of a receiver?

A. Yes, sir.

Q. And while at the time that this accident happened I believe that the Receiver was in charge?

A. Yes, sir.

[fol. 257] Q. And Mr. Allen was hurt. Well, were you the engineer of this switching crew that has been referred to here, in which Mr. Murdock and young Allen and John Jack and Mr. Murdock were members?

A. Yes, sir.

Q. You were the engineer?

A. Yes, sir.

Q. You went on duty at what time?

A. Twelve o'clock at night.

Q. Twelve o'clock; and what is the first thing you did?

A. Well, that was up to the switching foreman, what he did.

Q. What did you do—you did what he told you?

A. Exactly.

Q. But what did you do first?

A. Well, that depends on what it is you mean—what night?

Q. That night; I am talking about that night; no other night.

A. Well, I could not exactly say just exactly what we did do.

Q. You were running the engine?

A. We backed off of the hog track and went to work.

Q. You obeyed orders that were signaled to you by the men?

A. Yes, sir.

Mr. Polak: I am going to interpose; you said you would wait for me to object.

Mr. Hocker: All right.

Mr. Hocker:

Q. Did you see Mr. Allen that night, the gentleman who got his legs hurt?

A. No, sir.

Q. Did you learn of the accident shortly after it happened?

A. Yes, sir.

Mr. Polak:

Q. Did you say "Yes, sir," or "No, sir"?

A. "Yes, sir."

Mr. Hocker:

Q. Now, just a few minutes before this happened, what sort of a movement were you making?

[fol. 258] A. Well, we coupled up No. 9 and backed out of track No. 9, the local stuff, to switch it.

Q. About how many cars did you have on your track there?

A. I should judge about twenty-two or twenty-five cars.

Q. How far were you from the other end of the track; that many car lengths?

A. That many car lengths, exactly.

Q. That would be about——

A. About twenty-two or twenty-five car lengths, and if you went back over the switch where you were going to make a switch, that would make it a car length further.

Q. Did you know what particular movement was being made, with reference to placing cars at the other end?

A. I had no idea, whatever, what they were going to do with them.

Q. You did not see Mr. Allen at the time any cars were taken off?

A. No, sir.

Q. Were you in position where you could have seen him, the distance away from——

A. Well, if he were on track 4, and his light were exposed, and he set on track 4 or 5, and his lamp exposed, when I backed up probably I could have seen him, but if his lamp was not there I could not see, but I am going back up there almost continually; watch back and watch my man ahead and watch my track back, and watch my man ahead, and I did not see him.

Q. After you had been given a signal to stop and go ahead, you would not do any waiting, would you?

Mr. Polak: Object to that.
Mr. Hocker: All right; very good.
Mr. Polak: Objected to as leading.

Mr. Hocker:

Q. Do you know—you don't know anything about whether [fol. 259] these cars that ran over him were hooked onto your train or not?
A. No.
Q. At the time of the accident?
A. Well, I could not say whether they were hooked on or not, truthfully.
Q. Now, switching around in the yards there, do you confine yourself to any particular place, or do you move around?
A. I go every place.
Q. Do you watch out for men like the car checkers on the tracks?
A. Well, if I—surely, if I see anybody in the middle of the track I probably whistle at them, but they don't get there; there is no given rule that we should watch for them; they watch for themselves.
Q. Do you ring your bell and blow your whistle around through that yard?
A. Not unless it is necessary to do so.
Q. Unless you see someone in danger?
A. That is the only time.
Q. You did not see Mr. Allen?
A. No, sir.
Q. You know nothing about the way the accident happened?
A. No, sir.
Q. Except that you were operating the engine.

Mr. Hocker: That is all.

Cross-examination by Mr. Polak:

Q. Mr. Daniels, as engineer of the engine, which side of the cab were you on, the north side?
A. I was on the right side.
Q. I know, you were on the right side of the cab, but were you on the north?

A. North.

Q. Now, there is an automatic bell ringer on your engine, isn't there?

A. Yes, sir.

[fol. 260] Q. Did you also have control of the whistle cord?

A. Yes, sir.

Q. The fireman can reach the whiste cord, can't he?

A. No, sir; not unless he gets over on my side, and has no business there; he gets the bell.

Q. All right; you can ring the bell by the automatic bell ringer and also you have the whistle cord within your reach?

A. Yes, sir.

Q. If you had seen this man working down there between those tracks, before starting the engine, would you have rung the bell?

A. If I had seen him there, but it was not possible for me to see him.

Q. If you had seen him there under the conditions as they were, would you have rung the bell?

A. If I had seen him?

Q. Yes.

A. Certainly, if I knew the man was in the way.

Q. If you knew he was working between those tracks?

Mr. Hocker: He said if he knew the man was in the way.

Mr. Polak:

Q. I understood you to say if you had seen him down there you would have rung the bell.

A. I said if I knew the man was in the way I would have rung the bell.

Q. Well, seeing the man was one hundred yards ahead of you down the way, and knowing you were going to shunt cars or kick cars down that way, seeing his lantern, you would not have been able to tell what tracks he was between, would you?

A. Sir?

Q. Will you read the question?

(Thereupon, the reporter read the question.)

A. I don't think I would; no, sir.

[fol. 261] Q. You would not?

A. No, sir.

Q. And if you had seen a man down there at that distance, you would not have known whether he was between the rails or between the tracks, would you?

A. Not exactly; no, sir.

Q. You would not have known what track those cars were going down, would you, Mr. Daniels?

A. No, sir; not at that distance.

Q. Therefore, would you have sounded the bell when you had seen the man, knowing the cars were going down in that direction in that vicinity?

A. I say, I did not.

Q. I say, if you had, if you had seen him?

Mr. Hocker: I object to that as speculative.

The Court: The objection is sustained.

Mr. Polak:

Q. Did you sound the bell on that occasion, Mr. Daniel, before moving that engine, just before he was hit?

A. I don't recall, but I don't think I did, unnecessarily.

Mr. Polak: Now, I move that the "unnecessarily" be stricken out, your Honor, as not responsive.

The Court: All right.

Mr. Polak:

Q. You say you don't think you did?

A. I don't think so.

Q. Did you sound the whistle?

A. I don't think so.

Q. You are still working for the company, Mr. Daniels?

A. Yes, sir.

Q. You are now in the employ of that company?

A. Yes, sir.

Q. There has been no change there since the new administration, has there; the trains run just the same, and you men's duties are just the same under the Receiver and under the Toledo, St. Louis and Western, or under the [fol. 262] Nickel Plate, whatever they call it; there has been no change?

A. Their duties are just the same; yes, sir.

Q. You are working for them now; you have been over here since Tuesday, haven't you?

Mr. Hocker: Why, the plaintiff has been over here off and on since Tuesday.

Mr. Polak:

Q. With the claim agent for the railroad company?

A. Sir?

Q. Have you been over here with the claim agent for the railroad company?

A. I have been over here since, I don't know; I guess it was Tuesday.

Q. All of you men?

A. I have been over here, I know.

Q. And you have talked this case over with Mr. Thompson, the claim agent, haven't you?

A. Have talked it over with him?

Q. With Mr. Thompson, the claim agent, yes; he is around——

A. I don't recollect seeing very much of Mr. Thompson; I am under his orders to appear at this court room; that's all.

Q. And you never told him what you were going to testify to in this case?

A. Why, no, sir.

Q. Never talked to anybody about what you were going to say in this case?

A. Never talked to anybody; that is, to Mr. Thompson.

Q. Well, you did talk to some one else, though, about what you were going to say, didn't you?

A. Not that I recollect.

Q. What were you doing over here since Tuesday?

A. Well——

Q. Well, you were up in the Third National Bank Building, weren't you, or the Liberty Central Trust Building?

A. Yes, sir.

[fol. 263] Mr. Hocker:

Q. You were up at my office, weren't you, off and on?

A. Yes, sir.

Mr. Polak: I am examining him, Mr. Hocker.

Mr. Polak:

Q. How much do you get as engineer over there, Mr. Daniels?

A. It depends on the different class engines I run, generally $6.56 a day.

Q. How much are you getting for time while you are off from that job?

A. $7.46.

Q. What is the extra dollar for?

A. Why, to take care of my expenses, I suppose, and meals.

Q. Are you still in the employ of the company, and Mr. Murdock is also, isn't he?

A. Yes, sir.

Mr. Polak: That is all, Mr. Danields.

Mr. Hocker: That is all.

C. W. Morelein, of lawful age, was thereupon called as a witness and, being first duly sworn by the clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Hocker:

Q. What is your name, please?

A. C. W. Morelein.

Q. Where do you live?

A. Madison.

Q. What is your employment?

A. Fireman.

Q. How long have you been a fireman?

A. Two years.

Q. And you were fireman there last October when Mr. Allen was hurt?

A. Yes, sir.

Q. You was a fireman for about a year before that?

A. Yes, sir.

Q. You were on the engine the night of this accident?

A. Yes.

[fol. 264] Q. Did you know anything about the accident?

A. Not a thing.

Q. How it happened?
A. Didn't know anything about it at all.
Q. Until someone told you?
A. Yes.
Q. Who was receiving the orders that were being given with reference to movement of the engine and the cars that was handled?
A. You mean who was relaying the signals?
Q. Yes.
A. Well, George Allen, that was his work; I don't know whether he was doing it or not, but—I was not on that side of the engine.

The Court:

Q. Who was receiving them, so far as the engine was concerned, the occupants of the engine, you or the engineer?
A. The engineer, that is not my business.

Mr. Hocker:

Q. It is your job to keep the fire up so the engine goes?
A. I just steam and water.
Q. So you know nothing about this?
A. No.

Mr. Hocker: That is all.
Mr. Polak: That is all, Mr. Morelein.

Andrew Strobel, of lawful age, was thereupon called as a witness, and being first duly sworn by the clerk to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination by Mr. Hocker:

Q. Will you tell us your name, please?
A. Sir?
Q. Your name?
A. Strobel, Andrew Strobel.
Q. Are you a railroad man?
A. Yes, sir.
Q. How long have you been a railroad man?

A. About twenty-five years.

[fol. 265] Q. Twenty-five years; what is your job now?

A. Car inspector.

Q. How long have you been a car inspector?

A. About fifteen years.

Q. Whereabouts?

A. Madison, Illinois.

Q. These same yards we have been talking about?

A. Toledo, St. Louis and Western.

Q. All these fifteen years?

A. Yes, sir.

Q. Are these yards today located where they were sixteen years ago when you went to work there?

A. They are bigger, and in many other ways improved.

Q. The same yards, though?

A. The same yards.

Q. Only a little larger?

A. Yes, sir.

Q. Do you know these tracks 4 and 5?

A. Yes, sir.

Q. How long have they been there?

A. Oh, it would have—they have been there for the last fifteen years that I know of.

Q. Fifteen years?

A. Yes, sir.

Q. And what is a car inspector, what does he do?

A. He looks after the safety of the cars.

Q. Do you observe the cars in the yard and make note of anything the matter with them?

A. Yes, sir.

Q. Does that require you to get around in the yards?

A. Yes, sir.

Q. And when you are out in the yards, do you see the engines and the engineers, and firemen?

A. Yes, sir.

Q. Switchmen?

A. Yes, sir.

Q. And do you see car checkers out there?

A. Yes, sir.

Q. You knew Mr. Allen?

A. Yes, sir.

Q. Does the car checker stay around one place or where does he go with his work?

A. No, he is all over the yards.

[fol. 266] Q. All over the yards?

A. Yes, sir.

Q. There are no streets through these yards are there?

A. No, sir.

Q. Private property?

A. Yes, sir.

Q The public don't come there?

A. No, sir.

Q. Now, in moving around the yards you and the car checkers, do you get warning from the bell- and whistles on the engines moving around?

Mr. Polak: Just a minute, Mr. Strobel, before you answer that.

Mr. Hocker:

Q. As the yard is operated there, or do you look out for yourself?

Mr. Polak: Well, I don't care, I will withdraw the objection.

Mr. Hocker:

Q. I say, in moving around the yards there, looking after, finding out if the cars are all right or not, do the operators of the engine, is it the custom to give you warnings or do you watch out for yourself?

A. We have to watch out for ourselves.

Q. How about the car inspectors—I mean the car checkers?

A. I never knew that they had any warning as long as I been there; it is not customary, I don't think.

Q. How many engines operate there in the east end of that yard at a time, more than one?

A. Well, during the nighttime they only operate one engine.

Q. During nighttime?

A. Yes, sir.

Q. You are on the job at night now, aren't you?

A. Yes, sir.

Q. Have been for some time?

A. From 11 to 7 in the morning.

Q. Were you on duty the night Mr. Allen was injured?
A. Yes, sir.
[fol. 267] Q. Where were you?
A. Well, I could not exactly say where I was.
Q. Well, did you come to him shortly after it?
A. Well, I got word from Mr. Murdock that Mr. Allen was hurt.
Q. Did you go over there where he was?
A. I went over there where he was.
Q. Where was he?
A. Between 3 and 4.
Q. Clear of the rails?
A. No, I don't think so. I think he was over under the rails.
Q. Did you see his hat and lantern?
A. They was laying to one side.
Q. Where were they in reference to No. 4?
A. On the other side between 4 and 5.
Q. Did you have any—did you ask Mr. Allen anything?
A. No, the only thing I said to Mr. Allen, I said, "Mr. Allen, for God's sake how did you do that?"

Mr. Polak: Speak a little louder, Mr. Strobel; I can't hear you.
The Court: Speak up just a little louder.

A. Mr. Allen says——

Mr. Polak:

Q. What was it you asked him? I did not hear you.
A. I asked him how he done that, how it happened. He said he was standing between track 4, in track 4, and the cars come down and struck him. That's all was said.

Mr. Hocker:

Q. Then somebody went and got an ambulance and he was taken away?
A. Then Mr. Murdock, he come up there and he telephoned for an ambulance.
Q. Yes. That's all you know?
A. Yes.

Mr. Hocker: That is all.

[fol. 268] Cross-examination by Mr. Polak:

Q. Well, Mr. Strobel, as car inspector, you say you men have to look out for yourself?

A. Yes, sir.

Q. What do you do as a car inspector? Do you inspect the connections, the couplers, and so forth; do you do work in and around the cars?

A. Yes, sir.

Q. Do you do work under the cars?

A. Yes, sir.

Q. And when you do, you don't look out for yourself; you have a blue flag to use, don't you?

A. We have a blue light.

Q. You have a blue light set out at night and you have a blue flag stuck out in the ties back in the middle of the track in the daytime, don't you, the daytime?

A. Yes, sir; the daytime, day.

Q. There is also rules that no one shall move that flag except the man who put it there?

A. Yes, sir.

Q. What did you mean when you said the men are supposed to look out for themselves, when you told Mr. Hocker that?

A. That question was, he asked——

Q. Sir?

A. That question was——

Q. He asked you if men were supposed to look out for themselves.

A. They do.

Q. The car inspectors, the checkers; didn't you say yes?

A. The car inspector has his own blue light.

Q. Yes, sir; but car inspectors don't look out for themselves; they put out a signal and it is against the rules for anybody to move it, isn't it?

A. Yes, sir.

Q. They are protected by signals, aren't they?

A. Yes, sir; that is only certain times.

Q. Now, Mr. Strobel, you know these men in checking [fol. 269] cars, they have to face the car, don't you?

A. Face it?

Q. They have to look at the car they are checking, don't they?

A. We do, too; the car inspector has that to do, the same thing.

Q. And the car checker, though, has to look at the car he is checking, doesn't he?

A. Yes, sir.

Q. Has to face it, doesn't he?

A. Yes, sir.

Q. Who was present when Mr. Allen made that statement to you; was George Allen there?

A. George Allen and Mr. John Jacks.

Q. Now, what were his words again?

A I asked him how it happened and he said he was standing on track 4, and that the cinder cars come down and struck him; he was checking cars.

Q. And what was his position or condition when he said that?

A. I seen him laying on his back.

Q. He was laying on his back?

A. Yes, sir.

Q. Where was George Allen?

A. I think he was up at the head with his father.

Q. What?

A. At the head end of his father's body.

The Court: Head end of his father.

Mr. Polak:

Q. Had hold of his father, did you say?

A. Yes, sir.

Q. His father's head?

A. Yes, sir.

Q. Had his father's head in his lap, didn't he?

A. Yes, sir.

Q. And George Allen heard that?

A. I could not tell you whether he did or not.

Q. You asked him that question; were there any other questions asked him there?

A. No, sir.

Q. That was the only conversation; you asked him how that happened?

A. Yes, sir.

[fol. 270] Q. Now, you gave your deposition here about a week ago, didn't you, Mr. Strobel? I took your deposition, didn't I, over in Madison?

A. Yes, sir.

Q. And didn't you tell me over there that you didn't know anything about the accident when you give that deposition?

A. Them questions was not asked me.

Q. Yes. Well, after stating your name and telling where you worked, I asked you who was inspecting with you, didn't I, and didn't you say—give me the name of another man there, a man named Hulsey?

A. Yes, sir; Hulsey.

Q. I asked you where you were when the accident happened, and you said you were in the shanty; isn't that true?

A. Probably I was in the shanty.

Q. I asked you if Hulsey was there and you said he was there, too.

A. Yes, sir.

Q. And I asked you if that was the first you knew of it, and you said it was?

A. The first when Mr. Murdock came up.

Q. That is the first you knew of it?

A. Yes, sir.

Q. You weren't out there when it happened?

A. No, sir.

Q. Didn't see any part of it?

A. No, sir.

Q. I asked you if you went over there, and where was Allen when you got there and you said Allen was between tracks 3 and 4; you said that, didn't you?

A. Yes, sir.

Q. That's all you said, isn't it?

A. Yes, sir.

Mr. Hocker:

Q. Is that all he was asked?

A. That's all I was asked.

Mr. Polak:

Q. Well, you told me that was all you knew about the accident, didn't you?

A. Yes, sir.

[fol. 271] Q. Didn't you, Mr. Strobel?

A. Yes, sir.

Q. And you are in the employ of the company now? You are still in the railroad employ, you are still working for the company?

A. Yes, sir.

Mr. Polak: That is all, Mr. Strobel.

Henry Guy Hulsey, of lawful age, was thereupon called as a witness and, being first duly sworn by the clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Hocker:

Q. Will you state your name, please?

A. Henry Guy Hulsey.

Q. What is your business?

A. Car inspector.

Q. That is the same position that Mr. Strobel has?

A. It is.

Q. Were you car inspector on the night that Mr. Allen was injured?

A. Yes, sir.

Q. How long had you been in the employ of this company and the Receiver?

A. At the present time, up till now?

Q. Yes.

A. About sixteen months.

Q. You had not been working very long at the time of this accident?

A. No, sir.

Q. Had you been in the railroad work generally for some time?

A. Not very long; no, sir.

Q. Not very long. Well, on the particular occasion of this accident, did you see the accident?

A. No, sir.

Q. Now, when was the first you knew about it?

A. Mr. Murdock came into our shanty and told us that [fol. 272] he had run over a man down there, Mr. Allen;

he mentioned Mr. Allen's name; said he had ran over a man between—down there on track 4—and I jumped up and ran right down there, with his son, George Allen; he was behind me.

Q. When you got there, who was there?

A. Mr. Jack is all.

Q. Did you know Allen?

A. Yes, sir.

Q. Was he conscious?

A. Yes, sir.

Q. Did you say anything to him?

A. I did not, but Mr. Strobel did.

Q. What was said?

A. He asked him how he—what he was doing, how he come to be hurt.

Q. What did he say?

A. He said he was in track 4 when the cars came down and hit him.

Q. Was that all that was said?

A. To the best of my knowledge it was.

Mr. Hocker: I believe that is all.

Cross-examination by Mr. Polak:

Q. What was it he said?

No response.

Q. Now, you got there, you say, with Mr. Strobel?

A. Sir?

Q. You got over there with Mr. Strobel?

A. I went ahead, I preceded Mr. Strobel; I could run a little faster.

Q. Got there ahead of Mr. Strobel?

A. Yes, sir.

Q. You never asked him any questions?

A. No, sir.

Q. What was it he said to Mr. Strobel?

A. Mr. Strobel asked him what he had been doing and he said he was in track 4 when those cinder cars came down and hit him.

[fol. 273] Q. Now, those are his exact words, he was in track 4 when those cinder cars came down and hit him?

A. Yes, sir.

Q. Where were you, just how close to him were you?
A. About four feet.
Q. About four feet; were you standing up?
A. Yes, sir.
Q. Was he lying down?
A. Yes, sir.
Q. Was Mr. Strobel bending over him?
A. No, sir.
Q. Mr. Strobel was standing up?
A. I believe so, to the best of my knowledge.
Q. And this man was laying down with his foot off and other injuries?
A. Yes, sir.
Q. And you say he had a conversation there and told how it happened; was he groaning?
A. Yes, sir.
Q. He was groaning, was he?
A. Yes, sir.
Q. And yet he had time to tell this other man there how it happened?
A. Well, that part of it he said.
Q. Could he have said that he was between tracks four and five?
A. No, sir.
Q. He said he was standing on track four?
A. That is the way I understood it.
Q. That is the way you understood it. Now, what were his exact words?
A. He was standing in track four watching the cars come down, two cinder dumps come down and hit him.
Q. Watching the cars come down. Now, a minute ago, you didn't say anything about watching the other cars come down, did you?
A. Not to my knowledge.
Q. Well, did he say that?
A. Mr. Allen?
Q. Yes.
A. Yes, sir.
[fol. 274] Q. He said—now, which did he say, that he was standing in track 4 and the cars hit him, or he was standing in track 4 watching the cars come down and the cinder cars hit him?

A. He was standing in track 4 and watching the cars come down; I suppose he meant track 5, the cars coming in track 5, and the cars hit him coming down 4.

Q. Well, there were no cars coming down 5, were there?

A. I wasn't there; I don't know.

Q. How long were you men there with Mr. Allen?

A. Well, not any longer than it would take to get the flat car and the engine there, and we put him on the flat car and took him down to the elevated track.

Q. Who all took him?

A. I don't remember who all went—but I went with him. I held his hand all the way.

Q. You held his head?

A. His hand.

Q. You were with him?

A. Yes, sir.

Q. Who was there when this conversation took place?

A. Mr. Jack and Mr. Strobel.

Q. And yourself?

A. And myself.

Q. Was Mr. Murdock there?

A. Not to my knowledge, he was not.

Q. Where was Mr. Murdock?

A. I think he was coming, or arranging to get the ambulance sent.

Q. And George Allen was there, was he?

A. I could not say.

Q. The son. Well, you got there a little ahead of Mr. Strobel?

A. A little ahead; yes, sir.

Q. How?

A. Yes, sir.

[fol. 275] Q. You had only been working for them a couple of months at that time?

A. Yes, sir.

Mr. Polak: That is all, Mr. Hulsey.

Mr. Hocker: I want to offer one of the paragraphs in the former petition of this case, your Honor, please

Mr. Polak: Paragraph of what?

Mr. Hocker: I offer in evidence the plaintiff's amended petition in this case.

Mr. Polak: The second amended petition?

Mr. Hocker: No, the first amended petition.

Mr. Polak: The first amended petition. Well, now, the Court please, what he intends to read is that I alleged that the company was consolidated.

The Court: Wait until he reads it.

Mr. Hocker: Yes, that is the part of it I want to read—I won't read it, I will just put it in evidence.

Mr. Polak: I object to it for the reason hat motion was argued down in No. 1 and Mr. Finley argued it with me, and I asked Mr. Finley if the consolidation had gone through; he understood it had not; therefore, I dismissed against the Nickel Plate road.

The Court: The objection is overruled.

[fol. 276] Said first amended petition is in words and figures as follows:

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, APRIL TERM, 1923

HILBERT STUART ALLEN, Plaintiff,

vs.

WALTER L. ROSS, Receiver of Toledo, St. Louis and Western Railroad Company, a Corporation, and Toledo, St. Louis and Western Railroad Company, a Corporation, and New York, Chicago and St. Louis Railroad Company, a Corporation, Defendants.

AMENDED PETITION

Now comes plaintiff, by leave of Court, and files this, his amended petition.

Plaintiff states that he now is and at all times herein mentioned was a resident of the State of Illinois; that the defendant Toledo, St. Louis and Western Railroad Company now is and at all times herein mentioned was a foreign corporation, authorized and licensed to do and doing business in the State of Missouri, engaged in the business [fol. 277] of a common carrier of freight and passengers for hire between the different states of the United States

and at all of said times except as hereinafter stated, under the control, management and supervision of the defendant Walter L. Ross, who was then and there the legally appointed, qualified and acting Receiver in charge of the management and operation of said Toledo, St. Louis and Western Railroad Company and of all properties in connection therewith and especially of certain tracks, rails, roadbeds, locomotives, cars and other equipment then and there being operated at the time and place hereinafter complained of and more fully described, as a common carrier of freight and passengers for hire between the different states of the United States.

Plaintiff states that on the 29th day of December, 1922, the District Court of the United States for the Northern District of Ohio, Western Division (under and by whom said defendant Walter L. Ross was appointed, qualified and acting as Receiver in charge of the property of the defendant Toledo, St. Louis and Western Railroad Company, as aforesaid, at the times herein complained of), by a decree duly entered of record, directed the said Receiver, Walter L. Ross (one of the defendants herein) to return the property and equipment of the defendant Toledo, St. Louis and Western Railroad Company to said railroad; said decree, among other things, providing as follows:

"(a) Said property shall remain subject to all lawful liens thereon at the time of the delivery thereof by the Receiver to the defendant railroad company and shall be sub- [fol. 278] ject to such liens as are placed thereon by the terms of this order and decree and by the terms of orders and decrees hereafter made by this Court.

"(b) The defendant railroad company shall perform and discharge all lawful obligations and liabilities of the Receiver of every kind and character whatsoever incurred in the management and operation of said railroad and property by said Receiver; shall perform and discharge, on behalf of the Receiver, all contracts made by him and subsisting and unperformed at midnight on December 31, 1922; and shall defend and save said Receiver harmless from any and all claims, demands, debts, actions and causes of action of every kind and character whatsoever, heretofore or hereafter made or asserted against him and from any and all

costs and expenses incident thereto or resulting therefrom; provided, however, that the defendant railroad company shall have the right to appear and oppose, contest and defend any and all claims, debts, demands, actions and causes of action against said Receiver which it shall consider to be unlawful, improper or excessive.

"(c) The defendant railroad company shall pay all the expenses, disbursements and allowances heretofore or hereafter ordered in this cause to be paid and in the installments and at the times and in the manner so ordered to be paid; and the liens under such orders for the payment of such expenses, disbursements and allowances shall remain fixed upon said railroad and properties delivered by the Receiver to the railroad company hereunder.

"(d) The defendant Railroad Company shall, on behalf of said Receiver, take over and assume the prosecution or [fol. 279] defense, as the case may be, of all actions and suits at law or in equity by or against him, in which he is a party, by intervention or otherwise, pending and undetermined at midnight on December 31, 1922, or which shall thereafter be commenced in any court or tribunal; and the property and assets of the defendant Railroad Company shall be subject to the liens of any and all orders, judgments and decrees against said Receiver, and shall be subject to seizure and sale for the satisfaction thereof, as this Court shall from time to time order and direct; provided that the Receiver shall and he hereby is directed to proceed with the prosecution of the ancillary suit entitled 'Walter L. Ross, Receiver, v. The Toledo Terminal Railroad Company,' pending in the District Court of the United States for the Northern District of Ohio, Western Division, and all proceedings growing out of such suit; and the said defendant Railroad Company shall assume and pay the costs and expenses of said Receiver incurred in connection therewith and shall indemnify and save him harmless from all costs, expenses and liabilities in connection therewith or arising therefrom."

Plaintiff states that at all times herein mentioned the New York, Chicago and St. Louis Railroad Company was and is a foreign corporation licensed to do and doing busi-

ness in the State of Missouri and engaged in the business of a common carrier of freight and passengers between the different states of the United States.

Plaintiff states that on or about the 5th day of April, 1923, and subsequent to the date of the above mentioned order of the said District Court of the United States for [fol. 280] the Northern District of Ohio, Western Division, directing the return by the defendant, Walter L. Ross of said property and equipment to the defendant, Toledo, St. Louis and Western Railroad Company, and the entry of record in said District Court of said decree, the defendant New York, Chicago and St. Louis Railroad Company consolidated with, acquired, purchased and took over all the property and equipment of the defendant, Toledo, St. Louis and Western Railroad Company, including the tracks and equipment hereinafter complained of, and the control, operation and management thereof, and has ever since continued so to do, as a common carrier of freight and passengers for hire between the different states of the United States.

And plaintiff states that by reason of the facts and matters hereinabove set out, the Toledo, St. Louis and Western Railroad Company, and the New York, Chicago and St. Louis Railroad Company are necessary parties to a full, complete and proper determination of the matters herein complained of.

Plaintiff states that at the time plaintiff received the injuries herein complained of, the said defendant, Toledo, St. Louis and Western Railroad Company, under the control, management and supervision of the defendant, Walter L. Ross, as Receiver thereof, as above stated, was engaged as a common carrier of freight and passengers for hire, between the states of the United States; that plaintiff herein suffered the injuries herein complained of while he was employed and engaged by such carrier and such Receiver in charge thereof in such interstate commerce, plaintiff's in- [fol. 281] juries herein complained of resulting in whole or in part from the negligence of the officers, agents and employes of such carrier and such Receiver thereof, and by reason of defects and insufficiencies due to such carrier's and such Receiver's negligence in their cars, engines, appliances, machinery, tracks, roadbed, works and other equip-

ment, while said Receiver was in charge of such carrier, as hereinabove stated.

Plaintiff further states that the within action at law arose under and is based on Section 8657 of the United States Compiled Statutes, 1918, entitled, "An Act Relating to the Liability of Common Carriers by Railroads engaged in Interstate or Foreign Commerce, for injuries to Employes from Negligence"; approved April 22, 1908; and that said action was brought within the period of limitations now prescribed by State and Federal Statutes; and was brought within two years from the time said cause of action accrued.

Plaintiff, for his cause of action, states that at about 1:30 o'clock a. m., on the 27th day of October, 1922, while he was employed as above stated, in a place assigned him by the defendant, Walter L. Ross, Receiver of the Toledo, St. Louis and Western Railroad Company and the defendant Toledo, St. Louis and Western Railroad Company, to wit, in and about and near said defendants' railroad tracks in and near the city or town of Madison, in the State of Illinois, and particularly certain tracks of said defendants known and designated as switching tracks numbers four and five and while plaintiff was standing between said tracks engaged in checking certain of said defendants' cars in one of their trains standing on said track [fol. 282] number five and exercising due care and caution for his own safety, the said defendants carelessly and negligently caused certain of their cars then and there being moved and switched by one of their locomotives, in the process of making up the aforesaid train, to be moved westwardly on their said track number four, causing plaintiff to be suddenly and violently struck with great force by said moving cars and thrown to the roadbed, rails and ties of said tracks and dragged along and upon the surface thereof and run over by the wheels and trucks of said cars, and injured as hereinafter more fully described.

And plaintiff states that said defendants, their officers, agents and employes failed to furnish him a safe place in which to perform the duties assigned him.

And plaintiff further states that the said defendants, their officers, agents and employes in charge of said locomotives and moving cars saw, or by the exercise of ordinary

care could have seen, plaintiff between said tracks and in a position of peril and oblivious thereof in time thereafter, by the exercise of ordinary care, with the means and appliances at hand, to have either held said cars stationary, or after having started said cars, stopped them, or slackened the speed thereof in time, by the exercise of ordinary care, to have avoided striking and injuring plaintiff, but that said defendants, their officers, agents and employes failed and neglected to do so.

That the defendants failed to maintain a proper, adequate and safe width between the two tracks referred to, [fol. 283] in that the width was so small that the space between cars on said tracks was only about two feet, so that persons working in such space, and particularly this plaintiff, when one of said tracks was occupied by cars, would be liable to be struck and injured by cars being moved on the other of said tracks; all of which facts were well known to defendants, or by the exercise of ordinary care could have been so known.

And plaintiff states that his duties required him to make a record of the cars on said track number 5 and their contents and destination, and that in order to do so it was necessary for him to go from car to car continually facing said cars and with his back to said track number 4 and oblivious to the fact that cars were being moved or about to be moved on said track number 4; that the said defendants required him to perform this work very rapidly and faster than was consistent with his safety; and that by reason thereof he was required to and did continually face the said cars on said track number 5, intent on his said duties, and was not given an opportunity to look about him to assure himself that cars were not being moved on said track number 4; all of which facts plaintiff states the defendants well knew, or by the exercise of ordinary care could have known, and plaintiff states that by reason thereof, it thereupon became the duty of said defendants to have warned him by bell, whistle, or other signal before moving said cars on said track number 4, or to have provided and maintained a lookout man on said moving cars, and required said lookout man to have either warned plaintiff in time for him to have avoided being struck and injured by said cars, or ap- [fol. 284] plied the brakes and stopped said cars or slackened the speed thereof in time to have avoided striking and

injuring him; but plaintiff states that said defendants, their officers, agents and servants negligently and carelessly failed to do or perform any of the aforesaid things.

And plaintiff states that said defendants, their officers, agents and servants, at the time complained of, caused said moving cars on said track number 4 to be first propelled and started by a locomotive and then to be suddenly uncoupled from same, at a great distance from where plaintiff was at work at the time and place complained of, to wit, a distnace of about one hundred and sixty yards, and said cars thence and thereafter to roll or coast toward plaintiff, under their own momentum, and without steam or other power; and that by reason thereof said cars were caused to and did move silently and noiselessly toward plaintiff and the place where he was engaged in his duties as aforesaid, and in position of peril and oblivious to the movement of said cars and the danger of same; all of which facts plaintiff states the said defendants well knew, or by the exercise of ordinary care could have so known; and plaintiff states that by reason of the foregoing facts it became the duty of said defendants, their officers, agents and servants, to have warned him by bell, whistle or other signal that said cars were being moved, as aforesaid, or caused a lookout man to be on said moving cars, and required said lookout man to have either warned plaintiff in time for him to have avoided being struck and injured by said cars, or ap- [fol. 285] plied the brakes and stopped said cars or slackened the speed thereof in time to have avoided striking and injuring him; but plaintiff states that said defendants, their officers, agents and servants carelessly and negligently failed to do or perform any of the aforesaid things.

And plaintiff states that said defendants, their officers, agents and servants, carelessly and negligently failed and omitted to make, provide, promulgate and enforce safe and proper rules and regulations for the protection of persons working in and about the switching yards and tracks complained of; and carelessly and negligently failed and omitted to make and provide a code of signals by lights, bell, whistle or other device, for warning persons working in and about the switching yards and tracks complained of, including this plaintiff.

And plaintiff states that at the time complained of, his duties required him to perform his work with his face to-

ward the cars standing on said track number 5, and with his back toward said track number 4, the track on which said cars were caused to be moved by said defendants, as aforesaid; all of which facts were well known to said defendants, or by the exercise of ordinary care could have been so known; and that it thereupon became the duty of said defendants either to warn plaintiff by bell, whistle or other signal, or to maintain a lookout man on said moving cars so that such lookout man could have warned plaintiff, or applied the brakes on said cars and stopped said cars or slackened the speed thereof in time, by the exercise of ordinary care, to have prevented said cars from striking and injuring plaintiff. And plaintiff states that the said [fol. 286] defendants failed either to warn him by bell, whistle or other signal, or maintain a lookout man on said moving cars for the purpose of warning him or applying the brakes and stopping or slackening the speed of said moving cars in time to have prevented striking and injuring him as aforesaid; and plaintiff states that he had no means of knowing and did not know that the cars in question were about to be moved or were being moved on said track number 4 at the time complained of.

And plaintiff states that at the time complained of and for a space of about a half hour prior thereto he was engaged in the performance of his duties in the space between said tracks referred to, with a lighted lantern in his hands, and that said defendants, their officers, agents and employes saw said lantern and knew of the small space between said tracks, and the small space between cars on said tracks, and of plaintiff's presence there, and in a position of peril and oblivious thereof, or by the exercise of ordinary care could have seen and known all of these facts; and that by reason thereof it thereupon became their duty to have either warned plaintiff before moving cars as aforesaid or moved them slowly or caused said cars to remain stationary until plaintiff was in a position of safety or maintained a lookout man on said cars for the purpose of warning plaintiff, or applying the brakes on said cars so as to avoid striking and injuring him, as aforesaid; but plaintiff states that said defendants, their officers agents and employes carelessly and negligently failed so to do; and that he had no means of knowing and did not know that [fol. 287] the cars in question were about to be moved or

were being moved on said track number 4 at the time complained of.

And plaintiff states that as a direct result of each and all of the foregoing negligent and careless acts and omissions by said defendants, their officers, agents and employes, and the aforesaid defects and insufficiencies due to such defendants' negligence in their cars, engines, appliances, machinery, tracks, roadbed and other equipment, the aforesaid moving cars were caused to and did suddenly and violently strike and throw plaintiff to the roadbed, rails and ties of said tracks and drag him along and upon the surface thereof and the wheels and truck of said cars were caused to run over and injure him as follows:

That his right leg, and the bones, ligaments, muscles, tendons, nerves, tissues, arteries and blood vessels thereof, and especially from a point about two inches below the knee to the sole of his foot were broken, fractured, crushed, lacerated, ruptured and torn; so that it became necessary to and his said right leg was thereafter amputated at a point about five inches below the knee.

That his right leg at a point about three inches below the hip joint, and the bones, ligaments, muscles, nerves, tendons, tissues, arteries and blood vessels in said region were broken, fractured, wrenched, twisted, lacerated, ruptured and torn.

That the remaining portion of said right leg has become permanently shortened about four inches and shrunken, atrophied and useless.

That both shoulders, and the bones, ligaments, muscles, [fol. 288] nerves and tissues thereof were wrenched, twisted, dislocated, sprained, ruptured and torn.

That his body in the region of the chest, and the ligaments, muscles, nerves, tissues and arteries in said region were wrenched, lacerated, ruptured, sprained and torn; and that the pleura in said region and both lungs were wrenched, twisted, ruptured and torn.

That the third, fourth, fifth and sixth ribs on the left side were broken and fractured, at a point about one inch from the sternum, and torn loose from said sternum; and the ligaments, muscles, nerves, tendons, tissues, arteries and blood vessels in said region were wrenched, twisted, lacerated, ruptured and torn.

That his left arm at a point about half way between the shoulder and elbow, and the bones, ligaments, muscles, nerves, tendons, tissues and blood vessels in said region were broken, fractured, wrenched, twisted, ruptured and torn.

That his head at a point just over the left eye, and the flesh, nerves and tissues in said region were lacerated, cut and bruised; that his left ear, both the outer part and inner structural part, and the tissues, nerves, arteries and blood vessels in said region were wrenched, twisted, ruptured and torn, and the hearing of said ear impaired about 50 per cent.

That he sustained a severe and permanent shock to his nerves and nervous system.

Plaintiff states that all of the aforesaid injuries are permanent.

Plaintiff states that as a result of the aforesaid injuries he was caused to suffer, is now suffering and will in the [fol. 289] future suffer intense physical pain, mental anguish, headaches, sleeplessness and loss of appetite; that he has become permanently crippled and disfigured, and permanently disabled from performing his usual work as a train checker, at the rate of one hundred and thirty-six dollars per month, or any work from the date of the injuries complained of, until the date of the filing of this amended petition, or a total of six and a half months, with a consequent loss of earnings in an aggregate sum of eight hundred and eighty-four dollars; and that he is disabled from ever performing any kind of labor in the future, to his loss in an amount which it is impossible to state.

That as a result of said injuries he was compelled to incur and obligate himself for hospital attendance and board at the rate of twenty-five dollars per week, for a period of eleven weeks, or a total of two hundred and seventy-five dollars; that he has incurred and obligated himself for surgical services in the sum of five hundred dollars; and in the future he will be compelled to incur and obligate himself for surgical services, X-ray photographs and medicines and surgical appliances in a large sum, the exact amount of which it is impossible to state.

Wherefore, the premises considered, plaintiff states he has been injured and damaged in the sum of one hundred

thousand dollars ($100,000.00), for which amount, together with his costs, he prays judgment against the defendant.

H. R. Polak, Counsel for Plaintiff.

[fol. 290] Thereupon the defendant rested his case.

PLAINTIFF'S EVIDENCE IN REBUTTAL

Thereupon, the plaintiff, in rebuttal of the testimony and evidence offered and introduced by the defendant, offered and introduced the following evidence:

HILBERT STUART ALLEN, of lawful age, was thereupon recalled to the witness stand, and testified in rebuttal as follows:

Direct examination by Mr. Polak:

Q. Mr. Allen, what were you doing when these cars struck you?

A. Checking cars.

Mr. Hocker: I object to that as not rebuttal.

Mr. Polak: Well, the Court please, in view of the testimony of these other men it is in rebuttal.

The Court: It is absolutely not in rebuttal, he has already told on direct examination what he was doing. Now, he will come back and tell what he was doing again, and the others will come back on the stand and rehash the whole thing.

Mr. Polak:

Q. Did you hear the statement of Mr. Hulse, the witness just on the stand, while you were sitting here?

A. Yes, sir.

Q. Did you tell him you were standing on track 4 when you were hit?

A. No, sir.

[fol. 291] Q. What did you say, if anything?

A. Don't remember saying anything.

Q. You didn't say that?

A. No, sir.

Mr. Polak: That is all, Mr. Allen.
Mr. Hocker: That is all.
The Court: Any other witnesses?
Mr. Polak: That is all, your Honor.

And the above and foregoing is all the evidence offered and introduced during the trial of said cause.

DEMURRER TO EVIDENCE AT THE CLOSE OF ENTIRE CASE

Thereupon, at the close of the whole case, defendant Toledo, St. Louis and Western Railroad Company, by its counsel, presented to the Court in writing and requested the Court to give and read to the jury the following instruction in the nature of a demurrer to the evidence:

"The Court instructs the jury that under the pleadings and evidence in this case the plaintiff cannot recover against the defendant railroad company."

Which said instruction the Court refused to give and read to the jury; to which action and ruling of the Court defendant, by counsel, then and there excepted and still continues to except.

Also, at the close of the entire case, the defendant Walter L. Ross, Receiver, offered the following instruction:

"The Court instructs the jury that under the evidence in this case the plaintiff cannot recover against the defendant receiver."

[fol. 292] Which instruction the Court gave and read to the jury.

Instructions

PLAINTIFF'S REQUESTED INSTRUCTIONS GIVEN TO JURY

Thereupon, at the instance and request of plaintiff, the Court gave and read to the jury the following instructions, Nos. 2, 3 and 4:

(2) The jury are instructed that if they believe and find from the evidence that on October 27, 1922, the plaintiff was

in the employ of the defendant Walter L. Ross, and that said defendant was then the Receiver in charge of the property of the Toledo, St. Louis and Western Railroad Company and that said railroad company was then a foreign corporation and that the said Walter L. Ross, as such Receiver on charge of said railroad company, was engaged as a common carrier of freight and passengers for hire, between the different states of the United States, and that said railroad property so under the control of said Walter L. Ross, as such Receiver (if you so find), included certain yards and tracks located in or near the City of Madison, in the State of Illinois;

And if you further believe and find from the evidence that the plaintiff was in the employ of said Walter L. Ross, Receiver, as aforesaid, on the said 27th day of October, 1922, in the said yards, and that he was engaged in checking cars of freight on track No. 5 in said yards destined to the State of Ohio, and that at said time and place certain [fol. 293] other agents and employes of said defendant Walter L. Ross, Receiver, as aforesaid, were engaged in making up a train of cars and freight destined to points outside of and beyond the State of Illinois, and that said last-named agents and employes were in charge of and operating one of said Receiver's switch engines with cars attached; and that plaintiff and said defendant at said time were engaged in interstate commerce;

And if you further believe and find that at said time plaintiff's duties required him to be standing between two of the tracks in said yard, known as tracks No. 4 and No. 5, and running parallel with each other, checking cars, as aforesaid, on said track No. 5 and facing said track and cars, with his back to said track No. 4, and intent on such business; and if you find and believe that said place at said time was dark and unlighted; and if you further believe and find from the evidence that while plaintiff was so engaged (if you so find), the aforesaid agents and employes of said Walter L. Ross, Receiver, as aforesaid, suddenly, and without warning to plaintiff, caused certain cars attached to said switch engine, to be kicked loose from said engine and down said track No. 4, and past where plaintiff was engaged, as aforesaid, and strike and injure plaintiff;

And if you further believe and find from the evidence

that the space between said tracks No. 4 and No. 5, at the place where plaintiff was engaged, as aforesaid (if you so find), was so narrow that when said track No. 5 was occupied by cars, plaintiff was in danger of being struck and injured if cars were moved past him on track No. 4, and that the defendant Walter L. Ross and his agents and [fol. 294] employes in charge of said switch engine and cars and tracks knew of said condition of tracks and narrow space between same, or by the exercise of ordinary care could have known of such condition (if you find said condition existed); and if you further believe and find that such condition of tracks and space between, if you so find, was negligence;

And if you further believe and find that at said time and place, plaintiff was in a position of peril and oblivious thereof and that the agents and employes of said Walter L. Ross, as such Receiver, in charge of said engine and cars, saw, or by the exercise of ordinary care could have seen the plaintiff checking said cars, in a position of peril (if you so find), and oblivious thereof (if you so find), in time thereafter by the exercise of ordinary care, with the means and appliances at hand, to have warned plaintiff, or held such cars stationary, or, after having started them (if you find they did so start them), to have stopped them or slackened the speed thereof in time, by the exercise of ordinary care, to have avoided striking and injuring plaintiff (if you believe and find he was so struck and injured); and if you further believe and find that the agents and servants and employees of said Walter L. Ross, as such Receiver, in charge of said engine and cars, after so becoming aware (if you find they did become so aware) of plaintiff's perilous position (if you so find) and his obliviousness thereof (if you so find), failed to exercise ordinary care with the means and appliances at hand, either to warn plaintiff or hold said cars stationary, or, after having started them (if you so find) to stop them or slacken the speed thereof in time, by the [fol. 295] exercise of ordinary care, to have avoided striking and injuring plaintiff (if you so believe and find he was so struck and injured), and if you further believe and find that such failure (if you so find) was negligence on the part of said agents, servants and employes; and if you further believe and find from the evidence that at the time

said switch engine was so moved (if you so find) and just prior thereto the agents and employes of said defendant Walter L. Ross in charge of said switch engine failed to cause the bell on said engine to be rung; and if you further believe and find that said failure (if you so find) was negligence;

And if you further believe and find that said moving cars (if you so find), when "kicked" down said track No. 4, and at the time of and just before striking and injuring plaintiff, if you so find, were unlighted and had no one riding on them, and if you further believe and find that such movement of said cars without anyone riding on them and unlighted (if you so find) was negligence;

And if you further find that as a direct result of such negligence (if you so find), as hereinbefore set out on the part of defendant Walter L. Ross, Receiver, his agents and employes, plaintiff was struck by said cars and injured; and if you further believe and find from the evidence that at the time he was so struck and injured (if you so find), and prior thereto, the plaintiff was exercising ordinary care for his own safety, and was not injured as the result of any risks assumed by him, if any, as defined in the other instructions herein, then your verdict should be for the plaintiff, and against the defendant Toledo, St. Louis and [fol. 296] Western Railroad Company; provided, however, that you further find and believe from the evidence that subsequent to the 27th day of October, 1922, the District Court of the United States for the Northern District of Ohio (under and by which the said Walter L. Ross was appointed and acting as such Receiver), if you so find, made an order and decree directing the said Walter L. Ross, Receiver, to return the property and equipment of the defendant Toledo, St. Louis and Western Railroad Company to said railroad company; and provided you further find and believe that in compliance with said decree and order, the said Walter L. Ross, as such Receiver, returned said property and equipment to said defendant railroad company, and that said defendant railroad company received and accepted the same and entered into the possession thereof and assumed the defense of all actions in law or in equity against said Receiver, and if you further believe and find from the evidence that during the receiver-

ship of the said Walter L. Ross (if you so find), that said Receiver out of the net earnings of said railroad company during said receivership (if you find and believe from the evidence that such receivership resulted in such net earnings) applied to said railroad property in betterments and permanent improvements sum- in excess of the amount sued for by plaintiff herein, and that such property, when so returned to said railroad company (if you so find) was enhanced in value over and above the amount sued for by plaintiff herein.

(3) On the issue of assumption of risk, the Court instructs the jury that the plaintiff Hilbert Stuart Allen cannot be held to have assumed the risk of defects and dan- [fol. 297] gers, if any, in the method of work, unless the jury believes from the evidence that, prior to his injuries mentioned in the evidence, the plaintiff had knowledge of such defects and dangers, if any, or that such defects and dangers, if any, were plainly observable by him; and, unless the said Hilbert Stuart Allen did have such knowledge, or unless such defects and dangers, if any were plainly observable to him, as aforesaid, then the jury would not be warranted in finding for the defendant railroad company on the defense of assumption of risk.

The Court instructs the jury that "assumption of risk" is an affirmative defense and the burden of proving the same is on the defendant railroad company—all the evidence in the case to be considered.

In this connection, the Court instructs the jury that it was not the duty of Hilbert Stuart Allen to maintain extraordinary vigilance to discover defects and dangers in the method of doing the work, and that he had a right to believe that the defendants were doing their duty with reference to the method of doing the work unless the jury believes from the evidence that he had knowledge to the contrary; and the question of whether the plaintiff Hilbert Stuart Allen knew of the defects and dangers, if any, above mentioned, is a question of fact for the jury to determine from a consideration of all the facts and circumstances in evidence.

(4) The jury are instructed that if they find for the plaintiff, under all the evidence in the case, in estimating

and determining the measure of his damages, if any, they may take into consideration in connection with all the facts [fol. 298] and circumstances in evidence, the character and extent of the plaintiff's injuries, if any, they find and believe from the evidence he received, and whether such injuries, if any, are permanent in their nature, and may find for him such sum as in the judgment of the jury, under all the evidence in the case, will fairly and reasonably compensate him for the injuries the jury find and believe from the evidence he received, if any; and the Court further instructs you that if you find as above, except that you find and believe from the evidence that at the time the plaintiff was injured, if you find that he was injured, he was not in the exercise of ordinary care, and that the plaintiff was at the time guilty of negligence contributing to cause his injuries, if any, then, in that event your verdict to be for the plaintiff and against the defendant Toledo, St. Louis and Western Railroad Company, but in that event, the damages, if any, shall be diminished by you in proportion to the amount of negligence attributable to the plaintiff.

To the giving of which instructions on behalf of plaintiff, and each of them, defendant Toledo, St. Louis and Western Railroad Company, by its counsel, then and there excepted and still excepts.

At the instance and request of the defendant, Toledo, St. Louis and Western Railroad Company, the Court gave and read to the jury the following instruction, numbered 5:

(5) The Court instructs the jury that in entering upon his employment with Walter L. Ross, Receiver of the Toledo, St. Louis and Western Railroad Company, the plaintiff [fol. 299] assumed al risks and dangers ordinarily incident to such employment, and also such risks and dangers resulting from the negligence of such Receiver, which were obvious and fully known to him, or plainly and obviously perceptible to his observation, and the jury are further instructed that if you find from the evidence that at the time of his injuries plaintiff knew the proximity of tracks in the yard of the defendant, shown by the testimony, and of the dangers and hazards incident to such proximity, if any, then plaintiff assumed the risk incident to such construction of such tracks and the dangers incident thereto,

and is not entitled to recover upon the assignment of negligence with respect to the distance between tracks 4 and 5.

COURT'S INSTRUCTIONS TO JURY

Of its own motion, the Court gave and read to the jury the following instructions numbered 1 and 6:

(1) What constitutes "ordinary care" and "negligence" as mentioned in these instructions depends on the facts of each particular case. It is such care as a person of ordinary prudence would exercise (according to the usual and general experience of mankind) in the same situation and circumstances as those of the person or persons in this case with reference to whom the term "ordinary care" and "negligence" is used in these instructions. The omission of such care is negligence in the sense in which that word is used in these instructions.

[fol. 300] (6) The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agree upon a verdict, the same should be returned as the verdict of the jury, in which event all of the jurors who concur in such verdict shall sign the same.

If, however, all of the jurors concur in a verdict, your foreman alone may sign it.

To the giving of which instructions of the Court's own motion, and each of them, defendant, by its counsel, then and there duly excepted, and still continued to except.

DEFENDANT'S REQUESTED INSTRUCTIONS REFUSED

Defendant presented to the Court, in writing, and requested the Court to give and read to the jury the following instructions, marked A, B, C, D, E, F, G, H, I, J and K:

(A)

The Court instructs the jury that under the pleadings and evidence in this case the plaintiff cannot recover, and your verdict must be for the defendant.

(B)

The Court instructs the jury that the plaintiff cannot recover upon the assignment of negligence that the defendants failed to furnish plaintiff a safe place in which to perform the duties assigned to him, and that assignment is withdrawn from your consideration.

[fol. 301] (C)

The Court instructs the jury that the plaintiff is not entitled to recover upon the assignment- of negligence that the defendant failed and omitted to make, provide and promulgate safe and proper rules and regulations for the protection of persons working in the switching yards and provide a code of signals by lights, bells, whistle or other device for warning persons in or about said switching yards, and said assignments of negligence are withdrawn from your consideration.

(D)

The Court instructs the jury that the plaintiff is not entitled to recover upon the assignment of negligence that the defendants should have caused *their* agents and servants to warn plaintiff by bell, whistle or other signal of the movements of the cars or provided a lookout man on the moving cars to warn plaintiff or to apply the brakes or stop or slacken the speed of said cars to prevent injuring plaintiff, and that assignment of negligence is withdrawn from your consideration.

(E)

The Court instructs the jury that plaintiff is not entitled to recover upon the assignment of negligence that the defendants failed to warn plaintiff by bell, whistle or other signal of the movement of the cars mentioned in the evidence or in failing to provide and maintain a lookout to warn plaintiff, and that assignment of negligence is withdrawn from your consideration.

[fol. 302]

(F)

The Court instructs the jury that the plaintiff is not entitled to recover upon the assignment of negligence that the defendants failed to maintain a proper, adequate and safe width between the tracks referred to in the petition and evidence, and that assignment is withdrawn from your consideration.

(G)

The Court instructs the jury that the plaintiff cannot recover upon the assignment of negligence that the officers, agents and employes of the defendants saw, or by the exercise of ordinary care could have seen, plaintiff in a position of peril in time to avoid striking and injuring him, and that assignment is withdrawn from your consideration.

(H)

The Court instructs the jury that if you find from the evidence in this case that the plaintiff's injuries were due to his own carelessness and inattention in failing to look for and observe the cinder cars mentioned in the evidence, and not to any act of the defendant submitted for your consideration as being negligent or not, in other instructions, then plaintiff is not entitled to recover, and your verdict must be for the defendant.

(I)

The Court instructs the jury that if you find from the evidence that plaintiff's injuries were the result of his own carelessness and negligence in failing to exercise ordinary care to look for and observe the moving cars mentioned in [fol. 303] the testimony, then plaintiff is not entitled to recover, and your verdict must be for the defendant.

(J)

You are also instructed that even though you may find under other instructions read to you that the defendant was negligent at the time plaintiff was injured, and that such negligence contributed to his injuries, yet if you also find that plaintiff himself was guilty of negligence contributing

to his own injuries, then in the event that you find for plaintiff, you must diminish the damages to which you think he may be entitled in the proportion that the negligence of plaintiff contributed to the accident causing the injuries in question.

(K)

The Court instructs the jury that if you find from the evidence that it was the custom and method of the defendant, in the operation of its yards in Madison, Illinois, not to have the trainmen or the engine men give warning to car checkers while they were in the performance of their duties in said yard, and that plaintiff knew of such custom and method on the part of the defendant, then the plaintiff assumed the risks and dangers incident thereto, and cannot recover in this case upon the ground of the failure to warn him in connection with the switching of the cinder cars on track No. 4.

Which instructions, and each of them, the Court refused to give and read to the jury; to which action and ruling of the Court in refusing to give and read said instructions to [fol. 304] the jury, and each of them, defendant, by its counsel, then and there duly excepted, and still excepts.

VERDICT

Under the instructions of the Court, on the seventh day of December, A. D. 1923, at the December term, 1923, of said court, the jury returned into court the following verdict:

"We, the jury in the above cause, find in favor of the plaintiff and against defendant Toledo, St. Louis and Western R. R. Co., on the issues herein joined and assess plaintiff's damages at the sum of eighteen thousand dollars, and we further find in favor of defendant Walter L. Ross, Receiver of Toledo, St. Louis and Western R. R. Co. W. E. Cox, foreman."

MOTION FOR NEW TRIAL—Filed December 10, 1923

Now comes the defendant, Toledo, St. Louis and Western Railroad Company, and moves the Court to set aside

the verdict and judgment herein and grant it a new trial of this cause for the reasons following:

1. The Court erred in admitting incompetent, illegal, irrelevant nad immaterial evidence on the part of the plain-
[fol. 305] tiff, over the timely objections of the defendant.

2. The Court erred in excluding competent, relevant, legal and material evidence offered on the part of the defendant.

3. The Court erred in refusing the instruction offered by this defendant in the nature of a demurrer to the evidence, offered at the close of plaintiff's case in chief, marked "Instruction A."

4. The Court erred in refusing the instruction in the nature of a demurrer to the evidence, offered by the defendant, Toledo, St. Louis & Western Railroad Company at the close of all the evidence.

5. The Court erred in refusing each of the following instructions offered by this defendant, to wit: Defendant's instructions B, C, D, E, F, G, H, I, J, and K.

6. The Court erred in giving the following erroneous instructions on the part of the plaintiff, to wit: Plaintiff's instructions Nos. 2, 3, 4 and 5.

7. The Court erred in giving the following instruction of its own motion, to wit: Instruction No. 1.

8. The Court erred in giving conflicting instructions to the jury.

9. The verdict of the jury is against the evidence and against the law under the evidence.

10. The verdict of the jury is unsupported by the evidence.

11. The verdict of the jury is contrary to the weight of the evidence.

12. The verdict of the jury is grossly excessive and is the result of passion and prejudice on the part of the jury.

[fol. 306] And of the matters herein this defendant prays the judgment of the Court.

Jones, Hocker, Sullivan & Angert, Attorneys for Defendant, Toledo, St. Louis and Western Railroad Company.

ORDER OVERRULING MOTION FOR NEW TRIAL

On the fourteenth day of January, A. D. 1924, during the December Term, 1923, of said court, by an order duly made and entered of record, the Court overruled defendant's said motion for a new trial; to which action, ruling and order of the Court, in overruling said motion for new trial, defendant, by counsel, then and there duly excepted and still excepts.

APPLICATION AND AFFIDAVIT FOR APPEAL—Filed January 21, 1924

Now comes the defendant, Toledo, St. Louis and Western Railroad Company, and moves the Court to grant it an appeal from the judgment and decision of the Court herein, to the Supreme Court of Missouri.

Jones, Hocker, Sullivan & Angert, Attorneys for Defendant, Toledo, St. Louis and Western Railroad Company.

[fol. 307] STATE OF MISSOURI,
City of St. Louis, ss:

Ralph T. Finley, being first duly sworn according to law, on his oath states that he is the agent and attorney for the defendant, Toledo, St. Louis and Western Railroad Company, and duly authorized to make this affidavit, and that the appeal herein is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment and decision of the Court herein.

Ralph T. Finley, Agent and Attorney for Defendant.

Subscribed and sworn to before me, a Notary Public within and for the said city and state, on this 18th day of January, 1924. My term will expire March 1, 1927. Edward W. Lake, Notary Public.

Whereupon, the Court granted defendant an appeal in said cause to the Supreme Court of Missouri.

Order Settling Bill of Exceptions

Inasmuch as the foregoing evidence, proceedings, matters, things, rulings and exceptions do not appear of record, and in order that the same may be made a part of the record in this cause, so as to be presented to said Appellate Court, defendant here now presents to the Court this, its bill of exceptions, and prays that the same may be settled and allowed, approved, signed, sealed and filed and ordered [fols. 308-311] made a part of the record in this cause; all of which is accordingly done on this 8th day of December, 1925.

Robert W. Hall, Judge of the Circuit Court of the City of St. Louis, Division No. 6, at the time of the trial of said cause. Granville Hogan, Judge of Circuit Court of the City of St. Louis, at present presiding in Division No. 6.

O. K.: H. R. Polak, Attorney for Plaintiff.

O. K.: Jones, Hocker, Sullivan & Angert, Attorneys for Defendant.

Filed Dec. 8, 1925. John Schmoll, Clerk.

Appeal Perfected

And thereafter, within the time allowed by law and the rules of the Supreme Court, the appellant duly perfected its appeal in said cause by filing in said court a certified short transcript in said cause and by duly serving upon the respondent the printed abstract of record and printed statement, brief and argument for the appellant, and filing

the requisite number of copies thereof with the Clerk of said Supreme Court.

The foregoing is submitted by the appellant as and for an abstract of record in this cause.

Respectfully submitted.

Jones, Hocker, Sullivan & Angert, Attorneys for Appellant.

[fol. 312] IN SUPREME COURT OF MISSOURI, DIVISION No. 2

[Title omitted]

Appeal from the Circuit Court of the City of St. Louis

Honorable Robert W. Hall, Judge

APPELLANT'S SUPPLEMENTAL ABSTRACT OF RECORD—Filed March 25, 1926

At the time the appellant had its abstract of record printed herein it understood that it had a verbal agreement with counsel for the respondent that said counsel would stipulate that the X-ray photographs called for at page 162 of said abstract, and the X-ray negatives, known as Plaintiff's Exhibits L and M, called for at page 169 of said [fol. 313] abstract, in view of the difficulty of fairly reproducing the same, might be omitted from said abstract, and the originals filed with the clerk of this court for the inspection of the Court. Since printing said abstract, however, counsel, on account of misunderstanding, has refused to so stipulate. We, therefore, submit this supplemental abstract showing said X-ray photographs and Exhibits L and M. The photographs called for at page 162 of the abstract, referred to as X-ray pictures of the upper arm and skull and lateral view of the skull are negative, as shown by the testimony.

The other photographs offered at page 162 of the abstract, marked "H. S. Allen, 5-22-23, 19,656" (upper part of body and ribs), "H. S. Allen, 19,659, 5-22-23" (upper part of body and ribs) and "H. S. Allen, 19,659, 5-22-23" (pelvis and hip joints), are as follows:

(Here follow photographs marked side folio pages 314, 315, and 316)

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[fol. 317] Plaintiff's Exhibits L and M, called for at page 169 of the abstract of record, are as follows:

(Here follow Exhibits L and M, marked side folio pages 318 and 319)

The foregoing is submitted by the appellant as a supplemental abstract, served and filed at the same time as the original, for the purpose of showing said exhibits omitted from the original abstract.

Respectfully submitted.

Jones, Hocker, Sullivan & Angert, Attorneys for Appellant.

[fol. 320] Minute entry of argument and submission April 22, 1926, omitted in printing.

IN SUPREME COURT OF MISSOURI

[Title omitted]

JUDGMENT—August 16, 1926

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge, that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed, and stand in full force [fol. 321] and effect; and that the said respondent recover against the said appellant his costs and charges herein expended, and have execution therefor. (Opinion filed.)

Said opinion of the Court being in words and figures as follows, towit:

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[fol. 322] In Supreme Court of Missouri, Division Number Two, April Term, 1926

#25389

Hilbert Stuart Allen, Respondent,

vs.

Walter L. Ross, Receiver of Toledo, St. Louis & Western Railroad Company, a Corporation, and Toledo, St. Louis & Western Railroad Company, a Corporation, Appellant

Opinion

Plaintiff had a verdict and judgment against the Toledo, St. Louis and Western Railroad Company for $18,000 for damages for personal injuries sustained by him on October 27, 1922, while employed as a car checker at Madison, Illinois, by Walter L. Ross, receiver of said railroad company. The railroad company appealed.

Plaintiff had been employed as a car checker for about 18 months in the yards of the company at Madison, Illinois. There were a number of side tracks connected with a lead track running east and west. Plaintiff's hours of labor were from 11 p. m. to 7. a. m. His duties were to check the cars in freight trains, note the numbers and initials of cars and numbers of seals on sealed cars and their destinations, and write out a train sheet so the conductor of the train could recheck and get ready to leave on time. Plaintiff reported to the yardmaster, Flack, and went to work at 11 p. m. on October 26, 1922. He checked a train of about 34 cars on track 6 and while preparing the train sheet the train dispatcher sent in an order to let that train go out with only 19 cars and pick up others at Edwardsville. While Murdock, the switch foreman, and plaintiff were in the office of the yardmaster, Flack ordered Murdock to make up a train on track 5, to leave at 2:30 a. m. for points in Indiana and Ohio, and directed plaintiff to check the cars.

Plaintiff began at the west end of the train, between tracks 4 and 5 on the north side of the cars, facing the [fol. 323] south, with his left arm through the bail of his lantern and the latern on his shoulder. He was proceeding

in the customary manner, standing about 3 feet back from a car he was checking when, about 1:15 a. m., he was struck, run over, dragged and injured by a cinder car which was kicked or shunted west by the switching crew and engine on track 4, without any warning whatever. There was no man or light on the cinder car. Murdock, the foreman of the switching crew, knew that plaintiff was engaged in his duties between tracks 4 and 5, in fact saw him at a distance of 100 or 125 yards (or one whom he assumed was the plaintiff), with his lantern, engaged in checking the train, when Murdock cut loose two cinder cars from a string of cars being moved west on the lead track, and shunted them onto track 4 where they moved west at a speed of 4 to 6 miles per hour and ran over the plaintiff. They made very little, if any, noise, and were not heard or seen by plaintiff. Murdock's purpose was to make up a local freight train on track 4, due to leave at 7 a. m. Track 4 was clear when plaintiff began to check the train on track 5, and he believed the switching was all done, and was not informed there would be other switching in the yard before the departure of the train which he was checking. The clearance between the car plaintiff was checking and the cinder cars was about 2 feet 9 inches, without considering the grab irons on the cinders cars, which projected 4½ inches from each corner.

The testimony for plaintiff is that the switch yard was not lighted and there was no moon on the night he was injured. When the engine was about to be moved it was customary to ring the bell if any one was working nearby. It was customary, when plaintiff was engaged in checking cars, for passing switchmen to tell him if cars were to be switched by the place where he was working; that when he knew cars were coming down on another track he would flatten himself up against the car he was checking and allow them to pass him; that he had only half the usual time in which to do his checking and get the train sheet to the conductor; that when Murdock, the switch foreman, was about to cut the cinder cars loose from a string of cars which the engine was pushing on the lead track, he gave the usual [fol. 324] high ball and stop signals with his lantern which were relayed to the engineer (who was on the north side of

the engine and could not see plaintiff; these signals were received by the engineer, the cars were cut loose and shunted west on track 4, but no signal of this movement was given by bell, whistle or otherwise; that Murdock, from his position, could have called to plaintiff but he did not do so because he did not think plaintiff was in any danger from the cars; that Murdock heard plaintiff yelling and he and others ran to him and found that he had crawled over track 4 and was lying between tracks 3 and 4; an ambulance was called and plaintiff was taken to a hospital where he remained 11 weeks and 5 days.

Further testimony is that plaintiff's duties took him into all parts of the yard where he knew the crew would be switching cars, but ordinarily trains would be made up before he would go out to check them; that they hardly ever made up another train on a track where he was checking a train. It is conceded that the company had no rules regulating the movement of the engine or cars in making up trains or shunting cars in the yard, or for giving signals to car checkers or other employees in the yards to warn them of such movements.

The evidence for the defendant, including the testimony of one or two members of the switching crew who were plaintiff's witnesses, is that it is not usual or customary to give car checkers or other employees in the yard notice or warning by bell, whistle or otherwise, of the movement of the engine or cars in the yard, or of the shunting or kicking of cars on or along a track or side track; that it is the custom for all such employees to look out for their own safety during such operations; nor is it customary to put a light or to station a man on the end of a car that is being so moved or shunted to warn employees in the yard. No member of the switching crew except Murdock, the foreman, saw plaintiff in the yard, or knew that he was engaged in checking the train on track 5 at the time the cinder cars were shunted onto track 4, or knew that such movement would be attended with risk or danger to him.

[fol. 325] Plaintiff did not see or hear the cinder cars moving toward him. He felt something strike him and he was at once thrown down, run over and dragged under the car. His right leg was crushed and cut off about 6 inches below the knee; the right hip was dislocated, the

femur being pushed upward, resulting in complete ankylosis of the hip joint; both arms were broken and shoulders dislocated, several ribs were broken and plaintiff sustained a fracture or injury to the skull near the left ear, resulting in impaired hearing. Where the leg was amputated there is insufficient padding, making it hypersensitive at the end of the stump and the wearing of an artificial limb painful. This condition is permanent unless plaintiff should undergo another operation by cutting part of the bone away so as to get sufficient padding, Plaintiff still suffered pain from his injuries at the time of the trial, December, 1923, and was unable to do any kind of work, but otherwise was in good health. He was 45 years of age at the time he suffered his injuries and was then earning from $136 to $140 per month.

The action was commenced against the receiver of the railroad company on January 29, 1923, under the Federal Employers' Liability Act, it being conceded that the plaintiff and the receiver were engaged in interstate commerce at the time plaintiff sustained his injuries. Shortly after the action was commenced the receiver was discharged and the property of the railroad company, by an appropriate order of court, was returned to the company and it assumed all obligations and liabilities of the receiver. Thereupon an amended petition was filed, making the railroad company a co-defendant in this action. On July 18, 1923, a second amended petition was filed. The case was tried in December, 1923. We quote from the statement of appellant's learned counsel.

"The allegations of negligence were that defendant caused a moving car on track 4 to be first propelled and started by a locomotive and then to be suddenly uncoupled from same at a great distance from where plaintiff was working at the time and place complained of and roll said cars toward plaintiff without steam or other [fol. 326] power, and that plaintiff was at that time in a position of peril and oblivious to the movement of said cars and the danger thereof; that defendant knew, or by the exercise of ordinary care could have known, and it became the duty of defendant to know, the danger of plaintiff and his oblivion thereto, and to warn plaintiff by bell, whistle or other signal that said cars were being moved,

as aforesaid, or cause a lookout man on said moving cars to have been stationed to warn plaintiff in time for him to have avoided being struck or injured, or to have someone on said cars to apply the brakes, stop same or slacken the speed thereof in time to have avoided striking and injuring him, but that defendant wholly failed to do any of these acts; that defendant negligently omitted to provide and enforce proper rules for the protection of persons working about the switching yards, and neglected to provide a code of signals for warning persons working around said switch yards; that defendant knew that it was necessary for plaintiff to face toward the cars, standing on said track 5, with his back to track 4, and therefore it became the duty of defendant to warn plaintiff by bell, whistle or other signal, or by a lookout man on said moving cars or by a brakeman on said cars to apply the brakes, stop the same or slacken the speed in time to have prevented same from striking plaintiff, and plaintiff alleges that defendant took none of these precautions.

"For further and last ground of negligence plaintiff alleges that the place where he worked, checking the cars and where he had been at work for about one-half hour prior to his injury, with a lighter lantern in his hand, the space was so narrow between said tracks as to make dangerous the movement past plaintiff of cars on track 4, and that defendant saw the lantern of plaintiff and knew of the small space between the tracks, and that plaintiff was in a posi-[fol. 327] tion of peril and oblivious thereof, and that by the exercise of ordinary care defendant could have seen and known these facts, and, therefore, it became its duty to warn plaintiff before moving said cars or move them slowly or cause same to remain sationary until plaintiff was in a position of safety, or to obtain a brakeman or lookout man for the purpose of warning plaintiff or applying the brakes, in order to protect plaintiff from injury, none of which precautions defendant took.

"The plaintiff tried his case upon the theory that it was the duty of the defendant to warn him of the approach of the moving cars by a signal of some kind or by having a brakeman in the front end thereof to notify plaintiff of the approach of said cars, or by having a brakeman in proper place in time to apply the brakes, to slacken

the speed or stop said car to prevent same injuring plaintiff, and that if defendant failed so to d[illegible] defendant is liable; and upon the further theory that the space provided between tracks 4 and 5 at the point where plaintiff was injured was so narrow as to render it unsafe for a car checker to work while trains were being made up, and that defendant knew of this condition, or, by use of ordinary care could have so known, and knowing of the same negligently failed to notify plaintiff of the approach of the moving cars.

"The answer of defendant set up assumption of risk by plaintiff and contributory negligence on plaintiff's part by standing upon and in too close proximity to track 4.

"At the close of all the evidence in the case, the Court directed the jury to find a verdict for defendant Receiver and this action was based on the fact that the property had passed out of the hands of the Receiver and back into the possession of its owner, Toledo, St. Louis & Western Railroad Company.

"At the close of plaintiff's testimony in chief, defendant offered a demurrer to the evidence, which was overruled. At the close of the whole case, the defendant offered a de- [fol. 328] murrer to the evidence, which was also overruled.

"The defendant tried the case on the theory that when plaintiff accepted employment in the switch yards of defendant he assumed all the risks incident thereto arising from the usual and ordinary conduct of the business carried on in said yards; that defendant was under no obligation to promulgate a system of signals to warn car checkers or others employed in said yards of the movement of cars in making up trains in said yards; and that the method and manner of construction of the tracks of defendant within its switch yards, and which tracks were not designed for and not used by the public was a matter wholly within the control of the defendant company, and that a court had no right to submit to the jury the question as to whether or not defendant was negligent in the construction of its tracks 4 and 5 in the manner in which they had been constructed.

"The testimony of defendant showed that these tracks had been used fifteen years in the same condition in which they were at the time of plaintiff's injury; that plaintiff

had worked in these yards at night performing the same duties he was performing when he was injured one and one-half years, and that his duties carried him to all portions of the yard; that he was thoroughly familiar with the movement of cars, and that he was aware that no signals were customarily given when cars were moved in the switch yards. * * *

"The position of the defendant is that there is no liability here whatever, that the plaintiff assumed all the risks incident to the movement of the cars and that it was his duty under the law to look out for his own safety, that until such time as actual knowledge of defendant of the peril of plaintiff was brought home to the servants of defendant no duty whatever devolved on defendant to look out for the safety of plaintiff. * * *"

[fol. 329] 1. The plaintiff and the receiver of the railroad company were engaged in interstate commerce. The action is founded upon the federal Employers' Liability Act which is a humane statute and should receive a liberal construction. It abolishes the fellow servant rule and eliminates the defense of contributory negligence, except so far as it may be considered in the reduction of damages. Hence the rule announced in Degonia v. Railroad, 224 Mo. 564, 590, 123 S. W. 807, Aerkfelz v. Humphreys, 145 U. S. 418, 12 S. Ct. Rep. 835, and other cases cited by appellant, is not applicable, because we are not dealing with plaintiff's contributory negligence as a defense. See Crecelius v. Railroad (Mo.) 223 S. W. 413, 416, and Holman v. R. Co. (Mo.) 278 S. W. 1000.

In Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462, 36 S. Ct. Rep. 620, 622, an action by a brakeman for damages for personal injuries, the court said:

"The argument in effect concedes what is plainly inferable from the evidence, that the danger to a brakeman at work in switching at one end of a manifest train arising from switching operations by another crew at the other end, is not among the ordinary risks of a brakeman's employment. But, if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge on his part. To subject an employee, without warning, to unusual dangers not normally

incident to the employment, is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and [fol. 330] this includes care in establishing a reasonably safe system or method of work) and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence." See also Chesapeake & O. R. Co. v. Atley, 241 U. S. 310, 36 S. Ct. Rep. 564, 565, and cases cited.

In Tetwiler v. Railroad, 242 Mo. 178, 187, 156 S. W. 3, we said:

"The defendant had peculiar duties growing out of its relation to its employees, none of which were more important than that which required it to use reasonable care to furnish them a safe place to work, and in no situation is the performance of this duty more important than in an active railroad yard, where they are constantly menaced by the death-dealing appliances of the master. This necessity was expressed by the Supreme Court of Nebraska in Union Pacific Ry. Co. v. Elliott, 54 Neb. 299, 305, as follows: 'Irrespective of any statute on the subject, the starting or running of a switch engine, in a switch yard filled with a network of tracks upon which cars and engines are constantly moving and in which yardmen are constantly at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence.' This statement is adopted and expressed as the rule by Mr. Thompson in his work on Negligence, section 4489."

The appellant tried the case on the theory that when plaintiff accepted employment in defendant's switch yards

he assumed all the risks incident thereto arising from the usual and ordinary conduct of the business carried on in said yards. It is not contended that he assumed unusual or extraordinary risks, or risks or hazards unknown to him. [fol. 331] In fact it stands conceded that the dangers to which plaintiff was exposed were dangers created by appellant and which were or should have been fully known by the appellant's switch foreman. There is no controversy about the facts, the sole contention being that plaintiff was required to look after his own safety, and that he assumed the risk of being struck by the cinder cars.

The fallacy of this contention is that by shunting the cinder cars in the night time onto the track where plaintiff was working, without a light or a man on the cars and without warning of any kind, appellant created an unusual hazard. If it be true, as contended by appellant, that according to the practice in defendant's yard, cars could be shunted dangerously near to the place where plaintiff was working without any warning to him, then the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and he did not assume the risk. The contention is clearly opposed to the rulings in the Proffitt and Tetwiler cases, supra.

It is obvious, from the statement of appellant's counsel and from what we have said, that the verdict was for the right party, regardless of the instructions. It is provided by Section 1276 R. S. 1919: "The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Construing this statute, Judge Lamm, in Mocowik v. Railroad, 196 Mo. 550, 658, 94 S. W. 256, said:

"Similarly where a jury arrive at a just verdict, though the court held out a false light to them, or threw dust in their eyes (or to use the warlike metaphor of one of plaintiff's learned attorneys, 'let us go to the jury but shot our legs off before we got there') by bad instructions, yet it may not be disturbed. (Citing many cases.) See also Farmers' Loan & Trust Co. v. Surety Co. 285 Mo. 621, 652, 226 S. W. 926, and State v. Hembree, 295 Mo. 1,14,242 S. W. 911.

[fols. 332 & 333] Therefore we shall not extend this opinion by a discussion of the instructions. We think, however, there was no error in the instructions.

2. Plaintiff suffered the loss of his leg below the knee; his hip was dislocated and ankylosed. He has been unable to wear an artificial limb much of the time because of the sensitive condition of the stump of his leg. He still suffered pain at the time of the trial and was unable to do work of any kind. We do not feel warranted in disturbing the verdict. The judgment is affirmed. All concur.

Edward Higbee, Commissioner.

Railey, C., not sitting.

Per Curiam:

The foregoing opinion by Higbee, C., is hereby adopted as the opinion of the court. All concur.

[fols. 334-375] Petition for rehearing, covering 42 pages, filed August 21, 1926, omitted from this print. It was denied and nothing more by order October 21, 1926.

[fol. 376] In Supreme Court of Missouri

[Title omitted]

Order Denying Rehearing—October 21, 1926

Now at this day the court having considered and fully understood appellant's motion for a rehearing, heretofore filed herein, order *order* that the same be and is hereby overruled and the opinion adopted as modified. (Opinion filed.)

Which said modified opinion is in words and figures as follows, to-wit:

[fol. 377] In Supreme Court of Missouri, Division Number Two

[Title omitted]

Opinion

Plaintiff had a verdict and judgment against the Toledo, St. Louis and Western Railroad Company for $18,000 for damages for personal injuries sustained by him on October 27, 1922, while employed as a car checker at Madison, Illinois, by Walter L. Ross, receiver of said railroad company. The railroad company appealed.

The testimony for plaintiff is that he had been employed as a car checker for about 18 months in the yards of the company at Madison, Illinois. There were a number of side tracks connected with a lead track running east and west. Plaintiff's hours of labor were from 11 p. m. to 7 a. m. His duties were to check the cars in freight trains, note the numbers and initials of cars and numbers of seals on sealed cars and their destinations, and write out a train sheet so the conductor of the train could recheck and get ready to leave on time. Plaintiff reported to the yardmaster, Flack and went to work at 11 p. m. on October 26, 1922. He checked a train of about 34 cars on track 6 and while preparing the train sheet the train dispatcher sent in an order to let that train go out with only 19 cars and pick up others at Edwardsville. While Murdock, the switch foreman, and plaintiff were in the office of the yardmaster, Flack ordered Murdock to make up a train on track 5, to leave at 2:30 a. m. for points in Indiana and Ohio, and directed the plaintiff to check the cars.

Plaintiff began at the west end of the train, between tracks 4 and 5 on the north side of the cars, facing the [fol. 378] south, with his left arm through the bail of his lantern and the lantern on his shoulder. He was proceeding in the customary manner, standing about 3 feet back from a car he was checking when, about 1:15 a. m., he was struck, run over, dragged and injured by a cinder car which was kicked or shunted west by the switching crew and engine on track 4, without any warning whatever. There was no man or light on the cinder car. Murdock, the fore-

man of the switching crew, knew that plaintiff was engaged in his duties between tracks 4 and 5, in fact saw him at a distance of 100 or 125 yards (or one whom he assumed was the plaintiff), with his lantern, engaged in checking the train, when he, Murdock, cut loose two cinder cars from a string of cars being moved west on the lead track, and shunted them onto track 4 where they moved west at a speed of 4 to 6 miles per hour and ran over the plaintiff. They made little, if any, noise, and were not heard or seen by plaintiff. Murdock's purpose was to make up a local freight train on track 4, due to leave at 7 a. m. Track 4 was clear when plaintiff began to check the train on track 5 and he believed the switching was all done, and was not informed there would be other switching in the yard before the departure of the train which he was checking. The clearance between the car plaintiff was checking and the cinder cars was about 2 feet 9 inches, without considering the grab irons on the cinder cars which projected 4¼ inches from each corner.

The switch yard was not lighted and there was no moon on the night plaintiff was injured. When the engine was about to be moved it was customary to ring the bell if any one was working nearby. It was customary, when plaintiff was engaged in checking cars, for passing switchmen to tell him if cars were to be switched by the place where he was working; that when he knew cars were coming down on another track plaintiff would flatten himself up against the car he was checking and allow them to pass him; that he had only half the usual time in which to do his checking and get the train sheet to the conductor; that when Murdock, the switch foreman, was about to cut the cinder cars [fol. 379] loose from a string of cars which the engine was pushing on the lead track, he gave the usual high ball and stop signals with his lantern which were relayed to the engineer (who was on the north side of the engine and could not see plaintiff); these signals were received by the engineer, the cars were cut loose and shunted west on track 4, but no signal of this movement was given by bell, whistle or otherwise; that Murdock, from his position, could have called to plaintiff but he did not do so because he did not think plaintiff was in any danger from the cars; that Murdock heard plaintiff yelling and he and others ran to him

and found that he had crawled over track 4 and was lying between tracks 3 and 4; an ambulance was called and plaintiff was taken to a hospital where he remained 11 weeks and 5 days.

Further testimony is that plaintiff's duties took him into all parts of the yard where he knew the crew would be switching cars, but ordinarily trains would be made up before he would go out to check them; that they hardly ever made up another train on a track where he was checking a train. It is conceded that the company had no rules regulating the movement of the engine or cars in making up trains or shunting cars in the yard, or for giving signals to car checkers or other employees in the yards to warn them of such movements.

Plaintiff did not see or hear the cinder cars moving toward him. He felt something strike him and he was at once thrown down, run over and dragged under the car. His right leg was crushed and cut off about 6 inches below the knee; the right hip was dislocated, the femur being pushed upward, resulting in complete ankylosis of the hip joint; both arms were broken and shoulders dislocated, several ribs were broken and plaintiff sustained a fracture or injury to the skull near the left ear, resulting in impaired hearing. Where the leg was amputated there is insufficient padding, making it hypersensitive at the end of the stump and the wearing of an artificial limb painful. This condition is permanent unless plaintiff should undergo another operation by cutting part of the bone away so as to get sufficient padding. Plaintiff still suffered pain from his injuries at the time of the trial, December, 1923, and was [fol. 380] unable to do any kind of work, but otherwise was in good health. He was 45 years of age at the time he suffered his injuries and was then earning from $136 to $140 per month.

The evidence for the defendant, including the testimony of one or two members of the switching crew who were plaintiff's witnesses, is that it is not usual or customary to give car checkers or other employees in the yard notice or warning by bell, whistle or otherwise, of the movements of the engine or cars in the yard, or of the shunting or kicking of cars on or along a track or side track; that it is the custom for all such employees to look out for their

own safety during such operations; nor is it customary to put a light or to station a man on the end of a car that is being so moved or shunted to warn employes in the yard. No member of the switching crew except Murdock, the foreman, saw plaintiff in the yard, or knew that he was engaged in checking the train on track 5 at the time the cinder cars were shunted onto track 4, or knew that such movement would be attended with risk or danger to him.

The action was commenced against the receiver of the railroad company on January 29, 1923, under the Federal Employers' Liability Act, it being conceded that the plaintiff and the receiver were engaged in interstate commerce at the time plaintiff sustained his injuries. Shortly after the action was commenced the receiver was discharged and the property of the railroad company, by an appropriate order of court, was returned to the company and it assumed all obligations and liabilities of the receiver. Thereupon an amended petition was filed, making the railroad company a co-defendant in this action. On July 18, 1923, a second amended petition was filed. We quote from the statement of appellant's learned counsel:

"The allegations of negligence were that defendant caused a moving car on track 4 to be first propelled and started by a locomotive and then to be suddenly uncoupled from same at a great distance from where plaintiff was working at the time and place complained of and roll said [fol. 381] cars toward plaintiff without steam or other power, and that plaintiff was at that time in a position of peril and oblivious to the movement of said cars and the danger thereof; that defendant knew, or by the exercise of ordinary care could have known, and it became the duty of defendant to know, the danger of plaintiff and his oblivion thereto, and to warn plaintiff by bell, whistle or other signal that said cars were being moved, as aforesaid, or cause a lookout man on said moving cars to have been stationed to warn plaintiff in time for him to have avoided being struck or injured, or to have someone on said cars to apply the brakes, stop same or slacken the speed thereof in time to have avoided striking and injuring him, but that defendant wholly failed to do any of these acts; that defendant negligently omitted to provide and enforce proper rules for the protection of persons working about the switch-

ing yards, and neglected to provide a code of signals for warning persons working around said switch yards; that defendant knew that it was necessary for plaintiff to face toward the cars, standing on said track 5, with his back to track 4, and therefore it became the duty of defendant to warn plaintiff by bell, whistle or other signal, or by a lookout man on said moving cars or by a brakeman on said cars to apply the brakes, stop the same or slacken the speed in time to have prevented same from striking plaintiff, and plaintiff alleges that defendant took none of these precautions.

"For further and last ground of negligence plaintiff alleges that the place where he worked, checking the cars and where he had been at work for about one-half hour prior to his injury, with a lighted lantern in his hand, the space was so narrow between said tracks as to make dangerous the movement past plaintiff of cars on track 4, and that defendant saw the lantern of plaintiff and knew of the small space between the tracks, and that plaintiff was in a [fol. 382] position of peril and oblivious thereof, and that by the exercise of ordinary care defendant could have seen and known these facts, and, therefore, it became its duty to warn plaintiff before moving said cars or move them slowly or cause same to remain stationary until plaintiff was in a position of safety, or to obtain a brakeman or lookout man for the purpose of warning plaintiff or applying the brakes, in order to protect plaintiff from injury, none of which precautions defendant took.

"The plaintiff tried his case upon the theory that it was the duty of the defendant to warn him of the approach of the moving cars by a signal of some kind or by having a brakeman on the front end thereof to notify plaintiff of the approach of said cars, or by having a brakeman in proper place in time to apply the brakes, to slacken the speed or stop said car to prevent same injuring plaintiff, and that if defendant failed so to do, defendant is liable; and upon the further theory that the space provided between tracks 4 and 5 at the point where plaintiff was injured was so narrow as to render it unsafe for a car checker to work while trains were being made up, and that defendant knew of this condition, or, by use of ordinary care could have so known, and knowing of the same negligently

failed to notify plaintiff of the approach of the moving cars.

"The answer of defendant set up assumption of risk by plaintiff and contributory negligence on plaintiff's part by standing upon and in too close proximity to track 4.

"At the close of all the evidence in the case, the Court directed the jury to find a verdict for defendant Receiver and this action was based on the fact that the property had passed out of the hands of the Receiver and back into the possession of its owner, Toledo, St. Louis & Western Railroad Company.

"At the close of plaintiff's testimony in chief, defendant offered a demurrer to the evidence, which was overruled. [fol. 383] At the close of the whole case, the defendant offered a demurrer to the evidence, which was also overruled.

"The defendant tried the case on the theory that when plaintiff accepted employment in the switch yards of defendant he assumed all the risks incident thereto arising from the usual and ordinary conduct of the business carried on in said yards; that defendant was under no obligation to promulgate a system of signals to warn car checkers or others employed in said yards of the movement of cars in making up trains in said yards; and that the method and manner of construction of the tracks of defendant within its switch yards, and which tracks were not designed for and not used by the public was a matter wholly within the control of the defendant company, and that a court had no right to submit to the jury the question as to whether or not defendant was negligent in the construction of its tracks 4 and 5 in the manner in which they had been constructed.

"The testimony of defendant showed that these tracks had been used fifteen years in the same condition in which they were at the time of plaintiff's injury; that plaintiff had worked in these yards at night performing the same duties he was performing when he was injured one and one-half years, and that his duties carried him to all portions of the yard; that he was thoroughly familiar with the movement of cars, and that he was aware that no signals were customarily given when cars were moved in the switch yards. * * *

"The position of the defendant is that there is no liability here whatever, that the plaintiff assumed all the risks incident to the movement of the cars and that it was his duty under the law to look out for his own safety, that until such time as actual knowledge of defendant of the peril of plaintiff was brought home to the servants of defendant no duty whatever devolved on defendant to look out for the safety of plaintiff."

[fol. 384] 1. The plaintiff and the receiver of the railroad company were engaged in interstate commerce. The action is founded upon the Federal Employers' Liability Act, which is a humane statute and should receive a liberal construction. It abolishes the fellow servant rule and eliminates the defense of contributory negligence, except so far as it may be considered in the reduction of damages. Hence the rule announced in Degonia v. Railroad, 224 Mo. 564, 590, 123 S. W. 807, Aerkfetz v. Humphreys, 145 U. S. 418, 12 S. Ct. Rep. 835, and other cases cited by appellant, is not applicable, because we are not dealing with plaintiff's contributory negligence as a defense. See Crecelius v. Railroad (Mo.) 223 S. W. 413, 416, and Holman v. Co. (Mo.) 278 S. W. 1000.

In Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462, 36 S. Ct. Rep. 620, 622, an action by a brakeman for damages for personal injuries, the court said:

"The argument in effect concedes what is plainly inferable from the evidence, that the danger to a brakeman at work in switching at one end of a manifest train arising from switching operations by another crew at the other end, is not among the ordinary risks of a brakeman's employment. But, if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge on his part. To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to as-

sume that the employer has exercised proper care with re- [fol. 385] spect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work) and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence." See also Chesapeake & O. R. Co. v. Atley, 241 U. S. 310, 36 S. Ct. Rep. 564 565, and cases cited.

In Tetwiler v. Railroad, 242 Mo. 178, 187, 156 S. W. 3, we said:

"The defendant had peculiar duties growing out of its relation to its employees, none of which were more important than that which required it to use reasonable care to furnish them a safe place to work, and in no situation is the performance of this duty more important than in an active railroad yard, where they are constantly menaced by the death-dealing appliances of the master. This necessity was expressed by the Supreme Court of Nebraska in Union Pacific Ry. Co. v. Elliott, 54 Neb. 299, 305, as follows: 'Irrespective of any statute on the subject, the starting or running of a switch engine, in a switch yard filled with a network of tracks upon which cars and engines are constantly moving and in which yardmen are constantly at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence.' This statement is adopted and expressed as the rule by Mr. Thompson in his work on Negligence, section 4489." See also Kippenbrock v. Railroad, 270 Mo. 479, 483, 194 S. W. 50, and Greenwell v. Railroad (Mo.) 224 S. W. 404, 407, and cases cited.

The appellant tried the case on the theory that when plaintiff accepted employment in defendant's switch yards he assumed all the risks incident thereto arising from the [fol. 386] usual and ordinary conduct of the business carried on in said yards. It is not contended that he assumed unusual or extraordinary risks, or risks or hazards unknow to him or not plainly and obviously perceptible to his

observation. See defendant's instruction 5 infra. There was ample evidence from which the jury could find that the dangers to which plaintiff was exposed were dangers created by appellant and which were or should have been fully known by the appellant's switch foreman and were unknown to plaintiff and not plainly or obviously perceptible to his observation. There is really no controversy about the facts, the contention being that it was not customary to warn a car checker of the movement of cars in the switch yard; that plaintiff was required to look after his own safety; that he assumed the risk of being struck by the cinder cars, and that on the evidence the court should have directed a verdict for the defendant.

The fallacy of this contention is that by shunting the cinder cars in the night time onto the track where it was known that plaintiff was working, without a light or a man on the cars and without warning of any kind, appellant created an unusual hazard. If it be true, as contended by appellant, that according to the practice in defendant's yard, cars could be shunted dangerously near to the place where plaintiff was working, without any warning to him or knowledge of such custom or practice on his part, then the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and he did not assume the risk. The contention is clearly opposed to the rulings in the cases cited supra as well as to appellant's instruction 5 infra. The demurrer to the evidence was properly overruled.

2. Appellant assigns errors in the giving and refusal of instructions. Plaintiff's instruction 2 covers nearly 5 pages of the abstract. The portion complained of may be summarized as follows: If the jury find plaintiff's duties required him to stand between tracks 4 and 5, checking cars on track 5, with his back to track 4, and that said place was dark and unlighted, and that while he was so engaged, the [fol. 387] employees of the receiver, suddenly and without warning, kicked certain cars down on track 4 where plaintiff was so engaged so as to strike and injure him; that if you find the space between said tracks where he was working was so narrow that when track 5 was occupied by cars, plaintiff was in danger of being struck and injured by cars moved past him on track 4, and that defendants' said em-

ployees knew of said condition of tracks and narrow space, or by the exercise of ordinary care could have known of such condition, and if you further find such condition was negligence; and if you further find that plaintiff was then and there in a position of peril and oblivious thereof, and said agents and employees of the receiver saw, or by the exercise of ordinary care could have seen plaintiff checking said cars, in a position of peril and oblivious thereof, if you so find, in time thereafter, by the exercise of ordinary care, with the means and appliances at hand, to have warned plaintiff or to have held such cars stationary, or to have stopped or slackened their speed, by the exercise of ordinary care to have avoided striking or injuring him, and if you further find that said servants and agents, after becoming aware of plaintiff's peril and obliviousness (if you find they did so become aware) failed to exercise ordinary care with the means and appliances at hand, either to warn plaintiff or hold said cars stationary or to stop or slacken their speed in time by the exercise of ordinary care to have avoided striking or injuring him, and if you further find such failure (if you so find) was negligence, and if you further find said agents and employees before starting said engine failed to ring the bell on said engine, and you find such failure was negligence; and if you further find said moving cars on track 4 were unlighted and had no one riding on them, and if you further find that as a direct result of such negligence (if you so find) plaintiff was struck and injured by said cars, and if you further find that at the time he was so struck and injured and prior thereto, plaintiff was exercising ordinary care for his own safety, and was not injured as the result of any risk assumed by him, if any, as defined in other instructions, then your ve-dict should be for the plaintiff against the railroad company.

[fol. 388] Plaintiff's instruction 3, on assumption of risk, reads:

"On the issue of assumption of risk the court instructs the jury that the plaintiff cannot be held to have assumed the risk of defects and dangers, if any, in the method of work, unless the jury believes, from the evidence, that prior to his injuries mentioned in the evidence plaintiff had knowledge of such defects and dangers, if any, or that such defects and dangers, if any, were plainly observable to him; and

unless plaintiff did have such knowledge or unless such defects and dangers, if any, were plainly observable to him, as aforesaid, then the jury would not be warranted in finding for the defendant railroad company on the defense of assumption of risk; that assumption of risk is an affirmative defense and the burden of proving the same is on the defendant—all the evidence in the case to be considered; that it was not plaintiff's duty to maintain extraordinary vigilance to discover defects and dangers in the method of doing the work; that plaintiff had the right to believe that defendants were doing their duty with reference to the method of doing the work, unless the jury believe from the evidence that he had knowledge to the contrary, and whether plaintiff knew of defects and dangers, if any, above mentioned, is a question of fact for the jury to determine from all the facts and circumstances in evidence."

The court gave this instruction for the defendant:

5. The court instructs the jury that in entering the employment of the receiver of the railroad company, plaintiff assumed all risks and dangers incident to such work, and also such risks and dangers resulting from the negligence of the receiver, which were obvious and fully known to him, or plainly and obviously perceptible to his observation, and the jury are further instructed that if you find from the evidence that at the time of his injuries plaintiff knew the proximity of the tracks in the yards of the defendant, as shown by the testimony, and of the dangers and hazards incident to such construction of such tracks and the dangers incident to such proximity, if any, then plaintiff assumed the risk incident to such construction of such tracks and [fol. 389] the dangers incident thereto, and is not entitled to recover upon the assumption of negligence with reference to the distance between tracks 4 and 5.

Appellant complains of instruction 2: (1) It submitted the question whether defendant was guilty of negligence in having no light on the cinder cars; (2) it told the jury that defendant was bound to warn plaintiff of the approach of the cinder cars; (3) it told the jury that plaintiff did not assume the risk or danger in the method of doing the work in which he was engaged unless he had knowledge of such method, and unless such danger was plainly observable by

him, and, (4) it submitted the question whether defendant was guilty of negligence in maintaining tracks 4 and 5 in too close proximity when plaintiff was injured. Appellant's learned counsel argue that although defendant's employees knew of plaintiff's perilous position between the two tracks in the dark and unlighted yard, yet they contend that defendant had the right to expect a clear track, and that its employees in these circumstances might with impunity shunt these unlighted cars past plaintiff while he was so engaged, without any warning, and that by the custom and practice in the yard plaintiff was required to look after his own safety and that he assumed such unknown hazard as a risk incident to his employment. We are not dealing with a theory merely, but with a condition. The evidence shows, without any controversy, that Murdock, the switch foreman, saw and knew of the plaintiff's perilous position in the unlighted yard between the tracks, and must have known that the track was not clear, and should have realized that to undertake, in these circumstances, to send the blind cars noiselessly past plaintiff without warning, exposed him to an unknown peril.

Appellant's learned counsel cite Aerkfetz v. Humphreys, 145 U. S. 418, where the court said:

"He (plaintiff) knew that the switch engine was busy moving cars and making up trains and that at any moment cars were likely to be moved along the track upon which he was working. * * * It cannot be that under these [fols. 390-399] circumstances the defendants were compelled to send men in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected."

There is no support in this or other cases cited by counsel, for these contentions. Obviously there is no merit in the first, second, and third objections to plaintiff's instruction 2. They are opposed to the rulings in the cases cited, supra, as well as to defendant's instruction 5. Nor is there any merit in the fourth objection. Appellant is concluded by its instruction 5, that if plaintiff "knew the proximity of the tracks in the yard * * * and of the dangers and hazards incident to such proximity, if any, then plaintiff assumed the risk incident to such construction." Obviously

no danger lurked in the mere proximity of these tracks; the hazard arose from the negligent shunting of the cars, without warning of any kind, while plaintiff was engaged in his work between the tracks; that was the proximate cause of plaintiff's injury. Murdock saw plaintiff in this perilous position and could have called to him or warned him, but did not do so. It was on this failure to warn, and not on the proximity of the tracks, that plaintiff's instruction predicated his right to recover. The proximity of the tracks made the shunting of the cars, without warning of any kind, an unusual hazard.

3. Appellant complains of the refusal of its instruction K which reads: "The court instructs the jury that if you find from the evidence that it was the custom and method of the defendant in the operation of its yards in Madison, Illinois, not to have the trainmen or the enginemen give warning to car checkers while they were in the performance of their duties in said yards, and that plaintiff knew of such custom and method on the part of the defendant, then the plaintiff assumed the risks and dangers incident thereto and cannot recover in this case upon the ground of the failure to warn him in connection with the switching of the cinder cars on track 4."

This instruction was properly refused; it was covered by [fols. 400 & 401] defendant's instruction 5. Furthermore, it purports to cover the whole case and directs a verdict, and excludes a consideration by the jury of the humanitarian phase of plaintiff's case. Other assignments of error are without merit.

4. Plaintiff suffered the loss of his leg below the knee; his hip was dislocated and ankylosed. He has been unable to wear an artificial limb much of the time because of the sensitive condition of the stump of his leg. He still suffered pain at the time of the trial and was unable to do work of any kind. We do not feel warranted in disturbing the verdict. Finding no error in the record the judgment is affirmed.

Edward Higbee, Commissioner.

Railey, C., not sitting.

Per Curiam:

The foregoing opinion by Higbee, C., is hereby adopted as the opinion of the court. All concur.

[fol. 402] In Supreme Court of Missouri

[Title omitted]

Motion to Transfer Cause to Court en Banc—Filed October 20, 1926

Comes now appellant herein and moves the Court to set aside the judgment heretofore rendered in this cause and transfer the same to a court en banc for the following reasons:

1. The modified opinion in this case decides that in a private switch yard of a railroad company operating in this [fol. 403] state, while engaged in handling interstate commerce, in the movement of cars and trains in its yards it must warn car checkers and train operatives of the approach of cars and locomotives and of the movement of the same, and that the train operative or car checker engaged in his usual duties in a private switch yard of such railroad company so engaged in interstate commerce does not assume the risk of the movement of such trains and cars without signal of their approach being given to him while said cars and engines are being moved in the customary and usual manner of handling the business of switching cars and making up trains in private switch yards of a railroad company. In so holding, this decision is in direct conflict with the case of Degonia v. Railroad Company, 224 Mo. 564, in this, that the last-named case holds that in a private switch yard of a railroad company in Missouri the company is entitled to a clear track as to its employes who are engaged in said yard, and that it is the duty of such employes to look out for their own safety.

2. This Court has uniformly followed the decisions of the Federal Supreme Court that in cases under the Federal Employers' Liability Act on questions of liability thereunder in the state court the federal decisions control, and

the modified opinion in this case does not follow the federal cases of Pryor et al., Receivers of Wabash Railroad Company, v. Williams, 254 U. S. 43; Jacobs v. Southern Railway Company, 241 U. S. 229; Aerkfetz v. Humphreys, 145 U. S. 418; Seaboard Air Line Co. v. Horton, 233 U. S. 492, and Boldt, Admrx. of Boldt, v. Pennsylvania Railroad Co., 245 U. S. 441. This being so, the modified opinion in [fol. 404] this case is in conflict with the cases of Laughlin v. Missouri Pacific Railroad Co., 297 Mo. 345, and Brock v. Railway Co., 305 Mo. 502, wherein this Court held that in actions in the state courts under the Federal Employers' Liability Act the provisions of said act and the decisions of the Federal Supreme Court construing the same are controlling in the state courts.

3. The modified opinion in this case assumes that it was the custom in passing near a car checker when cars were to be moved or shunted onto tracks in the vicinity to warn him of same when the facts in the record do not justify any finding by this Court that any such custom existed, and the facts in the record do not show that any members of the switch crew operating in the private switch yard of appellant at the time respondent was injured passed near where respondent was at work, and as the prior decisions of this Court, above cited, are to the effect that this Court will follow the federal decisions in construing the Federal Employers' Liability Act, therefore, this Court should follow the decisions of the federal court as to what would establish the custom in a case of this kind where it is sought to found a liability on a custom said to have been established, and the modified opinion in this case does not follow the decisions as to what is necessary to establish a custom of the Eighth Federal Circuit Court of Appeals. In the case of Chicago, M. & St. P. Ry. Co. v. Lindeman, 143 Fed. 946, the Federal Court holds the law to be that where plaintiff's witnesses testify there was a custom of a switch crew to do a thing a certain way, and that they followed this cus- [fol. 405] tom, and defendant's witnesses testified that they performed the act at the same place in another way, and no witnesses contradict the testimony of the latter or testify that the alleged custom mentioned by the plaintiff's witnesses was either uniform or universal, the evidence is insufficient to warrant a finding by a jury that the alleged

custom was uniform, and hence the question of its existence should not be submitted to the jury. Hence, it appears that in the modified opinion in this case, the Court did not follow the prior decisions of this Court to the effect that the decisions of the federal court on questions of liability under the Federal Employers' Liability Act should govern in the Supreme Court of Missouri.

4. The modified opinion in this case is in conflict with the case of Degonia v. Railroad Company, 224 Mo. 564, in this, that the modified opinion in the case at bar quotes approvingly the following language from the Nebraska Court.

"Irrespective of any statute on the subject, the starting or running of a switch engine, in a switch yard filled with a network of tracks upon which cars and engines are constantly moving and in which yardmen are constantly at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence."

This language approves the doctrine that in private switch yards of railroad companies in this state, the railroad company is not entitled to a clear track, and must warn employes of the movement of its cars and the approach of its engines.

[fols. 406 & 407] While the Degonia case squarely holds that within the private yards of a railroad company in this state employes engaged in work about or upon the tracks or in connection with the movement of cars are not entitled to signals of the approach of trains or the movement of cars.

—— ——, Attorneys for Appellant.

[fol. 408] In Supreme Court of Missouri

[Title omitted]

Suggestions in Support of Motion to Transfer to Court en Banc—Filed October 21, 1926

With all due respect for the two opinions of the Court written in this case, and for the brief of opposing counsel, as well, we respectfully suggest that after all the discus-

sion and argument in the briefs of counsel of both appellant and respondent, and after a consideration of the two [fol. 409] opinions written by this Court in this cause, we are constrained to the belief that after all discussion and argument in this case, the decision is finally founded by this Court in its modified opinion upon the proposition that the failure to have a wider space between the tracks where respondent was at work is the real basis upon which the Court places its opinion holding that appellant is liable herein. It is true the Court in its modified opinion says that the failure to warn of the approach of the car, coupled with the narrow space between the tracks, created an unusual hazard, and, therefore, appellant is liable. In its last analysis, this statement is founded on the proposition that the danger was occasioned because of the narrow space between the tracks creating thereby the necessity of giving warning of the approach of the moving car.

The deduction we make from this statement of the Court that the combination of the narrowness of space between the tracks and the absence of warning of the approach of the car created an unusual hazard is that, if the space had been ample between the tracks, the shunting of the car without warning of its approach would not have created an extra hazard, and, there being no extra hazard in this case, there could be no liability. If we are correct in this deduction, then, as we have stated, the final proposition on which the Court rests the liability of appellant is that the space between its tracks where respondent worked was too narrow. We may be wrong in this interpretation of the Court's opinion, but this is the way in which we understand it.

As to point 1 of the motion to transfer to Court en banc, wherein it is stated that the modified opinion in this case [fol. 410] is in conflict with the opinion in the case of Degonia v. Railroad, 224 Mo. 564, we beg to say that the Court disposes of the Degonia case, as we read the modified opinion, by saying that it dealt with a case of contributory negligence, and that the case at bar is not one of contributory negligence, but one of assumption of risk. The Court then proceeds to state in its opinion that the Tetwiler case, 242, Mo. 178, is controlling in the case at bar. We beg to suggest that an examination of the Tetwiler case shows that the defense of contributory negligence is pleaded in that case, as well as assumption of risk, and the opinion of the

Court eliminated the question of assumption of risk and reversed the case with directions that the lower court should submit the question of contributory negligence to the jury and not submit the question of assumption of risk. If a case of contributory negligence in Missouri Supreme Court Reports is not in point and not to be used as an authority for the proposition of a right of a railroad company to a clear track in switch yards of this state, we cannot see why a case of contributory negligence arising from the operation of trains in a switch yard should be an authority in support of the proposition that the railroad company is not entitled to a clear track in its private switch yards. We are not of the opinion, however, that the mere fact that the case is one of contributory negligence in either instance would affect the principle involved. The principle involved is whether or not the relation between the employe and the railroad company is such as to require warning to employes of the approach of cars and movement thereof in switch yards in actions begun under the Federal Employers' Lia-
[fol. 411] bility Act.

As to the Tetwiler case, we further beg to suggest that it was not a case that was brought under the Federal Employers' Liability Act, but was begun under the Missouri statutes. It is true the Degonia case was also a case begun under the Missouri statutes. We cannot see how the modified opinion in this case construing the Tetwiler case to hold that railroad companies are not entitled to a clear track can be harmonized with the decision in the Degonia case, which holds that in a private switch yard the railroad company is entitled to a clear track.

There is another feature in connection with the Tetwiler case that is wholly absent in the case at bar, to wit, in the Tetwiler case the record disclosed the fact that it was undisputed that the railroad company's rules required in a switch yard warning be given by sounding a bell, and that it was not done in the Tetwiler case, while in the case at bar the evidence distinctly shows that there was no rule requiring any warning to be given of the movement of cars in the switch yards. This vital distinction eliminated, in our opinion, the Tetwiler case as a precedent in the case at bar.

We respectfully submit that in the case at bar the decision of the Federal Supreme Court on the question of whether or not a railroad company should give its employes

in its private switch yards notice of the approach and movement of its cars should and must be controlling, for the reason that this action in the case at bar is founded on a federal statute. There is no question but that in the federal [fol. 412] courts the rule is that no warning of the approach and movement of the cars in a private switch yard of a railroad company need be given to its employes in the ordinary conduct of its business, for the reason, as stated by the Supreme Court, employes are aware of these movements constantly going on and those moving the cars have a right to assume that the employes will protect themselves from the dangers which they know constantly menace them in a switch yard.

The modified opinion in this case, in quoting the Nebraska court, to the effect that regardless of statute the movement of trains in switch yards without giving warning thereof by signal is, regardless of a statutory provision, negligence and creates liability on the part of the railroad company to an injured employe engaged in working in a private switch yard, is squarely in conflict, in our opinion, with the decision of the Degonia case, which says that in private switch yards no warning of the approach or movement of trains or cars need be given to employes engaged in such private yards of a railroad company.

The Court in its opinion apparently finds, in our judgment, the facts to be that respondent was unaware of any danger and of the movement of the cars, and that appellant knew that respondent was in danger and could have warned him. We respectfully submit that, in our opinion, the facts disclosed in the record do not justify the finding that the respondent was unaware of the movement of the cars and of the custom of moving them in the manner in which they were moved without warning of their approach, and that [fol. 413] appellant knew of the danger of respondent and could have notified him thereof.

The Court in its modified opinion says:

"There was ample evidence from which the jury could find that the dangers to which plaintiff was exposed were dangers created by appellant and which were or should have been fully known by the appellant's switch foreman and were unknown to plaintiff and not plainly or obviously perceptible to his observation."

In our opinion, there is not sufficient evidence in the record to justify this statement.

We quote the following from the cross-examination of Mr. Murdock (Appellant's Abs. of Rec., p. 77):

"Q. You assumed—you could not see what he was doing and you could not see sufficiently clear to identify it as Mr. Allen?

A. No, sir."

Rcross-examination (page 92):

"Mr. Polak (Q.): Could you have hollered at him?

A. If I knew he was in there, in danger."

It is true that Mr. Murdock further testified that he assumed the light he saw down in the tracks belonged to Mr. Allen, but it will be observed that in his cross-examination he testified that he could not identify Mr. Allen, and that if he could identify him, he could not tell whether he was close to the track or on the track or a sufficient distance away from it to avoid being struck. A distance of one hun-[fol. 414] dred and twenty-five yards of a moonless night is in itself evidence that one man could not tell what relation another stood in with reference to tracks that far away. For these reasons, we respectfully say that with all due deference to the findings of fact, as stated in the opinion of the Court, we hardly think the evidence justifies a finding that Mr. Murdock, as the agent of appellant, knew of the danger in which Mr. Allen was, and should have notified him.

The Court further says in its modified opinion:

"If it be true, as contended by appellant, that according to the practice in defendant's yard, cars could be shunted dangerously near to the place where plaintiff was working, without any warning to him or knowledge of such custom or practice on his part, then the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work, and he did not assume the risk."

In our judgment, the evidence, we respectfully submit, shows that the respondent had worked in the yards for a

year and a half, nightly, and that cars were constantly shifted without warning of any kind being given to respondent, or to any other employe in the yard, and that this was the customary and usual method of doing the work. This being so, it seems to us that it would be a physical impossibility for respondent to have worked in that yard for a year and a half and not know that cars were thus shifted without warning of their approach being given.

[fol. 415] The Court further says in its modified opinion:

"The evidence shows, without any controversy, that Murdock, the switch foreman, saw and knew of the plaintiff's perilous position in the unlighted yard between the tracks, and must have known that the track was not clear, and should have realized that to undertake, in these circumstances, to send the blind cars noiselessly past plaintiff without warning exposed him to an unknown peril."

This statement by the Court assumes that respondent was in a position of peril when he stood between the tracks. This could only be on account of the narrow space between the tracks. This, therefore, brings the opinion in this case to the fundamental proposition that the Court bases the liability of appellant on the fact that the space between its tracks was too narrow. This must be the basis unless the Court further means to hold that the movement of the cars with no one on them or no light to show their approach made an unusual hazard. Both of these propositions have been decided adversely by the federal courts in the cases heretofore cited, and the ruling of this Court in this opinion is directly in conflict with the federal cases cited, and in not following the federal cases this Court, in our opinion, departs from the decisions heretofore made by the Missouri Supreme Court to the effect that the federal decisions are binding in cases under the Federal Employers' Liability Act.

The Court further says, in its modified opinion:

"Murdock saw plaintiff in this perilous position and could have called to him or warned him, but did not [fol. 416] do so. It was on this failure to warn, and not on the proximity of the tracks, that plaintiff's instruction

predicated his right to recover. The proximity of the tracks made the shunting of the cars, without warning of any kind, an unusual hazard."

In this sentence the Court bases its opinion squarely on the proposition that the failure to warn of the approach of the car, coupled with an unlighted track, created the unusual hazard. We submit:

1. Respondent knew of the movement of these cars and knew of the custom to so move them.

2. In his year and a half work it must have been perfectly obvious to him that cars were moved in this manner night after night.

3. The Federal Supreme Court decided in cases cited that it was not necessary to warn one who knows that cars are being moved in a switch yard.

4. The federal court has decided that the space between the tracks is not a proper proposition to submit to a jury, because the manner in which tracks are built in a private switch yard is an engineering question not to be left to the caprice of each jury in each damage suit.

Suppose there had been a distance of twelve or fifteen feet between passing cars at the point where plaintiff was injured, and suppose the car had been shunted down as it was without warning of its approach and plaintiff had been struck: Without more facts than these appearing, we believe this Court would not hold that defendant was liable. If so, then the statement of the Court, in the sen- [fol. 417] tence quoted, that the proximity of the tracks, coupled with failure to notify of the approach of the car, created the extra hazard, was unnecessary because if the space between the tracks was twelve or fifteen feet wide and it took the narrow space to create the extra hazard, there would be no extra hazard, and being no extra hazard, in the absence of proof that Murdock knew, as foreman, that plaintiff was in danger, there could be no recovery. On the question as to whether Murdock knew plaintiff was in danger, we quote again the testimony of Mr. Murdock on direct examination (Appellant's Abs. of Rec., p. 77):

"Q. You assumed—you could not see what he was doing, and you could not see sufficiently clear to identify it as Mr. Allen?

A. No, sir."

Abstract of record of appellant, page 92:

"Mr. Polak (Q.): Could you have hollered at him?

A. If I knew he was in there, in danger."

Mr. Murdock here clearly says that he did not know that respondent was in danger and he had no right to assume that he was in danger. This condition of affairs leads us to interpret the opinion to mean that, in the last analysis, the liability of appellant is based on the proposition that the space between the tracks was too narrow, and that this created an extra hazard. If this is the basis on which the liability is placed, clearly the decision of the Court is in [fol. 418] conflict with the decisions of the Federal Supreme Court heretofore cited.

We therefore respectfully submit that, in our opinion, this case should be transferred to the Court en banc for the reasons hereinabove suggested, and we respectfully ask the Court to sustain our motion to that effect.

Respectfully submitted.

—— ——, Attorneys for Appellant.

[fol. 419] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 420 & 421] In Supreme Court of the United States

Order Allowing Certiorari—Filed February 28, 1927

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

end

No. 8[redacted]160

Office Supreme Court, U. S.
FILED
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WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
Petitioner,

vs.

HILBERT STUART ALLEN,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
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vs.

HILBERT STUART ALLEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Toledo, St. Louis & Western Railroad Company, a corporation, presents this, its petition for a writ of certiorari, to be addressed to the Supreme Court of the State of Missouri, and for cause therefor respectfully represents:

The petitioner is a railroad corporation owning and operating a railroad for the transportation of persons and

commodities, in part, in interstate commerce. Hitherto the railroad of the petitioner was in the possession of one Walter L. Ross, as Receiver thereof, under the orders and appointment of the District Court of the United States for the Western Division of the Northern District of Ohio, and such Receiver was for a time engaged in the operation of the petitioner's said railroad.

Hilbert Stuart Allen, while employed by the Receiver as a car checker in the railroad yards of the respondent at Madison, in the State of Illinois, suffered injuries.

He thereafter brought his action against the Receiver in the Circuit Court of the City of St. Louis, asserting that his injuries were due to the negligence of the Receiver and his employes in particulars presently to be noted, and while the respondent and the employes of the Receiver were engaged in operations connected with interstate commerce within the scope of the Federal Employers' Liability Statute.

Pending this action, the Court which had appointed the Receiver discharged him and restored the possession of its road to the petitioner upon condition that the petitioner assume obligations of the Receiver incurred in and with respect to his possession and operation of the property. Thereupon the respondent amended his petition aforesaid so as to name the petitioner as a party to his action, and presently the Receiver was dismissed therefrom, and the same proceeded thenceforward, between the respondent as plaintiff and the petitioner herein as the sole defendant,

to an inquiry into the alleged negligence of the Receiver and his employes in the particulars specified.

Upon a trial of the cause there was a verdict and judgment for the respondent (R. 3), and the petitioner appealed the cause to the Supreme Court of the State of Missouri (R. 4).

In that court, in due course, upon a hearing to a division of the Court, there was an affirmance of the judgment of the Circuit Court (R. 320) upon an opinion delivered by the division (R. 322-332).

A motion filed by the petitioner for a rehearing (R. 334-374) was denied on October 11, 1926 (R. 376); but the opinion of the Court was modified thereon (R. 377-391).

The petitioner presented an application for the transfer of the cause to the Supreme Court of Missouri en banc for hearing (R. 393-396), which was denied on December 21, 1926 (R. 411).

The facts developed at the trial were these:

The petitioner owns, and the Receiver was operating at the time of the accident to respondent, a railroad switching yard at Madison, in the State of Illinois, in which trains were regularly made up for movement over the railroad of the petitioner. A portion of this yard consisted of a lead track with various sidetracks running off from the same, parallel with each other, and connected with the lead by means of switch stands. A plat appearing in the record, at page 103, will serve to show the relative location of the switch tracks so far as necessary to the case.

Photographs following page 177 will serve to show the spacing between these tracks when occupied by cars, and the relation of the space remaining to the space occupied by a human body, and will also visualize the construction of the two cinder cars, the movement of which resulted in the hurts of which the respondent complained.

With these preliminary observations we take the facts developed at the trial from the statement thereof in the final opinion of the Supreme Court of the state indicating in notes following wherein we think there is departure from the facts as shown by the record:

> "The testimony for plaintiff is that he had been employed as a car checker for about eighteen months in the yards of the company at Madison, Illinois. There were a number of sidetracks connected with a lead track running east and west. Plaintiff's hours of labor were from 11 p. m. to 7 a. m. His duties were to check the cars in freight trains, note the numbers and initials of cars and numbers of seals on sealed cars and their destinations and write out a train sheet so the conductor of the train could recheck and get ready to leave on time. Plaintiff reported to the yardmaster, Flack, and went to work at 11 p. m. on October 26, 1922. He checked a train of about thirty-four cars on track 6, and while preparing the train sheet the train dispatcher sent in an order to let that train go out with only nineteen cars and pick up others at Edwardsville. While Murdock, the switch foreman, and plaintiff were in the office of the yardmaster, Flack ordered Murdock to make up a train on track 5 to leave at 2:30 a. m. for

points in Indiana and Ohio and directed plaintiff to check the cars.

"Plaintiff began at the west end of the train, between tracks 4 and 5 on the north side of the cars, facing the south, with his left arm through the bail of his lantern and the lantern on his shoulder. He was proceeding in the customary manner, standing about three feet back from a car he was checking, when, about 1:15 a. m., he was struck, run over, dragged and injured by a cinder car which was kicked or shunted west by the switching crew and engine on track 4, without any warning whatever. There was no man or light on the cinder car. Murdock, the foreman of the switching crew, knew that plaintiff was engaged in his duties between tracks 4 and 5; in fact, saw him at a distance of 100 or 125 yards (or one whom he assumed was the plaintiff), with his lantern, engaged in checking the train, when he (Murdock) cut loose two cinder cars from a string of cars being moved west on the lead track and shunted them onto track 4 where they moved west at a speed of four to six miles per hour and ran over the plaintiff. They made little, if any, noise, and were not heard or seen by plaintiff. Murdock's purpose was to make up a local freight train on track 4, due to leave at 7 a. m. Track 4 was clear when plaintiff began to check the train on track 5, and he believed the switching was all done, and was not informed there would be other switching in the yard before the departure of the train which he was checking. The clearance between the car plaintiff was checking and the cinder cars was about two feet nine inches, without considering the grab irons on the

cinder cars which projected four and one-fourth inches from each corner.

"The switch yard was not lighted and there was no moon on the night plaintiff was injured. When the engine was about to be moved it was customary to ring the bell if anyone was working near by. It was customary, when plaintiff was engaged in checking cars, for passing switchmen to tell him if cars were to be switched by the place where he was working; that when he knew cars were coming down on another track plaintiff would flatten himself up against the car he was checking and allow them to pass him; that he had only half the usual time in which to do his checking and get the train sheet to the conductor; that when Murdock, the switch foreman, was about to cut the cinder cars loose from a string of cars which the engine was pushing on the lead track he gave the usual high ball and stop signals with his lantern, which were relayed to the engineer (who was on the north side of the engine and could not see plaintiff); these signals were received by the engineer, the cars were cut loose and shunted west on track 4, but no signal of this movement was given by bell, whistle or otherwise; that Murdock, from his position, could have called to plaintiff, but he did not do so because he did not think plaintiff was in any danger from the cars; that Murdock heard plaintiff yelling and he and others ran to him and found that he had crawled over track 4 and was lying between tracks 3 and 4; an ambulance was called and plaintiff was taken to a hospital, where he remained eleven weeks and five days.

"Further testimony is that plaintiff's duties took him into all parts of the yard where he knew the

crew would be switching cars, but ordinarily trains would be made up before he would go out to check them; that they hardly ever made up another train on a track where he was checking a train. It is conceded that the company had no rules regulating the movement of the engine or cars in making up trains or shunting cars in the yard, or for giving signals to car checkers or other employes in the yards to warn them of such movements.

"Plaintiff did not see or hear the cinder cars moving toward him. He felt something strike him and he was at once thrown down, run over and dragged under the car. * * * The evidence for the defendant, including the testimony of one or two members of the switching crew who were plaintiff's witnesses, is that it is not usual or customary to give car checkers or other employes in the yard notice or warning by bell, whistle or otherwise, of the movements of the engine or cars in the yard, or of the shunting or kicking of cars on or along a track or sidetrack; that it is the custom for all such employes to look out for their own safety during such operations; nor is it customary to put a light or to station a man on the end of a car that is being so moved or shunted to warn employes in the yard. No member of the switching crew except Murdock, the foreman, saw plaintiff in the yard, or knew that he was engaged in checking the train on track 5 at the time the cinder cars were shunted onto track 4, or knew that such movement would be attended with risk or danger to him" (Rec., pp. 378, 379, 380).

Additional Observations Are These:

1. Some, at least, of the cars which the respondent was engaged in checking were to move in interstate commerce (R. 46, 153, 106-109).

2. The respondent, as a witness, described the night as just an ordinary night, except the moon was not shining (R. 107). Other witnesses named it as a clear, starlight night (R. 64, 152).

3. The effect of the testimony offered at the trial by the respondent as to warning from switchmen, when cars were to be shunted or switched in his vicinity, is overstated by the Commissioner of the state court who prepared the opinion of that tribunal. The plaintiff himself said *if the switchmen happened to pass by his vicinity* they would tell him they were presently intending to switch other cars onto the track on which he was working, or onto adjoining tracks, if such were the fact (R. 111). His son, who was a switchman, and who testified for the respondent, made the same statement, but added that, *if the switchmen were not brought near the checker in the course of their duties, he was not furnished with such information* (R. 135). There was no other testimony on that subject, and the undisputed facts show that on the night of the accident suffered by the respondent the switchmen were not in his vicinity after he began his duties (R. 157).

4. The respondent knew the switching crew were working in the yard (R. 122-123). His testimony shows no effort on his part to kep himself informed as to what they were doing (R. 104-126).

5. The alleged knowledge of Murdock, the foreman of the switching crew, as to the position of the respondent at the time the cars were shunted onto track 4 on the orders of Murdock is not supported by the record. The photographs make plain the fact that an employe engaged in switching cars has ample room between the tracks without subjecting himself to risk. Murdock was one hundred and twenty-five yards away from the respondent at the time the two cars were, upon his order, shunted onto the adjoining track to that at which the respondent was working at the time. The only witness with respect to what Murdock could or could not observe was Murdock himself. All he could see was a lantern, which he assumed to be carried by the respondent merely from his knowledge of respondent's duties. Murdock did not know and could not possibly have ascertained that the respondent had placed himself so near to track 4 as to be in danger from the movement of cars thereon. On this there is no conflict in the testimony (R. 67, 80, 81, 84, 86 and 94).

6. The clicking of the cars over the joints of the rails was audible one or two car lengths away (R. 152).

In the charge to the jury the trial court authorized the jury to convict the Receiver of negligence (a) if the space between the tracks was believed by the jury to be too re-

stricted; (b) if Murdock, in the act of causing the cars to be shunted onto the adjoining track, was aware that the respondent had placed himself in a position of peril and was oblivious thereto, *or if Murdock might have ascertained this situation by the exercise of ordinary care;* (c) if the jury regarded it as dangerous to shunt the cars onto the adjoining track without lights and with no one riding thereon; (d) if the movement was made without causing the bell to be rung on the engine (R. 292, 298).

Conversely, the trial court refused to withdraw from the jury the alleged negligence in failing to ring the bell or to have a man ride the shunted cars (R. 301): the alleged negligence with respect to the relative location of the tracks (R. 302); the charge that the employes of the Receiver might have seen the respondent in a position of peril in time to avoid the accident (R. 302).

That court also refused to charge the jury that if it was the custom in the yard not to give warning to car checkers of car movements, and the respondent knew the fact, he assumed the risks incident to that method of work (R. 303).

To all these rulings exceptions were taken by the petitioner (R. 298, 303) and were preserved in accordance with the local practice (R. 305) in the record taken before the Supreme Court of the state for review.

The final opinion of the Supreme Court of the state will be found at pages 377-391 of the printed record. And with respect thereto we submit the following

cognizable here.

I.

The judgment of affirmance, although not dealing with the question, necessarily affirmed the action of the lower court in authorizing the jury to convict the Receiver of negligence based upon the manner in which the engineers of the petitioner had located these tracks with respect to each other, whereas on correct principles, often declared and enforced by this Court, the respondent assumed whatever risk was involved in working under such conditions.

II.

The State Supreme Court affirmed the view of the court below that it was negligence on the part of the Receiver not to have someone ride these shunted cars with a light and so as to control their movements, ignoring the uncontradicted testimony that the custom of the yard was to do as was here done, and the respondent must needs have known the fact and assumed the risk under the principles often declared by this Court.

III.

The Supreme Court approved and applied to the case (R. 385) its own previously expressed view (Tetwiler v. Railroad, 242 Mo. 178) that it was negligence to move the

switch engine without ringing the bell, rather than the view of this Court (Randall v. Baltimore & Ohio Railroad Co., 109 U. S. 482; Aerkfetz v. Humphreys, 145 U. S. 418), that the ringing of the bell under such conditions as a warning to employes but leads to confusion, and fails, therefore, of its purpose, and is not required by proper rules of the law.

IV.

The Supreme Court of the State erred in classing the shunting of these cars without a man or light on them as an unusual hazard which the respondent did not assume, despite the entirely uncontradicted testimony that it was done all the time when occasion demanded, and to the full knowledge of the respondent, for the full eighteen months in which he had worked in the yard in the same capacity in which he was working at the time of his injury.

V.

The Supreme Court erred in holding that a practice of shunting cars onto adjoining tracks without warning deprived the respondent "of a reasonably safe place to work," and in consequence "he did not assume the risk" of injury therefrom.

VI.

The Supreme Court erred in ruling that the foreman of the switching crew saw or should have seen the respondent in a perilous position and should have taken steps to avoid injuring him.

Wherefore, the petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, requiring and directing that Court, by and upon a date certain, to be designated therein, to certify and send to this Court a full, true and complete transcript of the record and proceedings in said court in the cause lately pending therein wherein the respondent, Hilbert Stuart Allen, was the respondent, and the petitioner herein, Toledo, St. Louis & Western Railroad Company, was the appellant, and numbered of that court 25,389; to the end that said record and said cause may be reviewed and determined by this Honorable Court and

whatever of right and justice ought to be done therein may be done, and that your petitioner may have such other and further remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the judgment of the Supreme Court of the State of Missouri in said cause may be reversed and for naught held.

WALTER A. EVERSMAN,
JAMES C. JONES,
LON O. HOCKER,
EDWARD C. CROW,
FRANK H. SULLIVAN,
Counsel for Petitioner.

State of Missouri, }
City of St. Louis. } ss.

Frank H. Sullivan, being duly sworn, upon his oath says that he is one of the counsel for the petitioner herein; that he prepared and is familiar with the contents of the foregoing petition for writ of certiorari, and that the statements therein contained are true, as he verily believes.

Frank H. Sullivan.

Subscribed and sworn to before me this 4th day of January, 1927.

My commission expires March 1, 1927.

Edward W. Lake,

(Seal) Notary Public.

BRIEF.

The jurisdiction of this Court is invoked herein on the ground that the Missouri Supreme Court failed and refused to follow the previous rulings of this Court on the question of the liability of petitioner under the Federal Employers' Liability Act. The original opinion of the Supreme Court of Missouri, affirming the judgment of the trial court against your petitioner, was rendered on August 16, 1926 (R. 320); petitioner's motion for a rehearing was filed in due course and was denied on October 21, 1926 (R. 333), but on said last-named date the Supreme Court filed a modified opinion herein (R. 377, *et seq.*), not yet officially reported. Thereafter, petitioner filed its motion to transfer the cause to the Supreme Court of Missouri en banc (R. 393), which was overruled on December 21, 1926 (R. 411).

That the respondent was engaged in interstate commerce at the time of his injuries is settled (Pecos etc. Railway Co. v. Rosenbloom, 240 U. S. 439).

While it is true that in a proceeding of this character this Court will not undertake to revise the findings of fact of the state court if these find support in the record, it is as equally well-settled that, upon questions such as here, the record will be examined to the extent necessary to ascertain if the findings are supported by the testimony; and if such is not the fact, the case will be dealt with on

the basis of the facts rather than on what the state court have said that these were (Baltimore & Ohio Southwestern Railroad Co. v. Burtch, 263 U. S. 540; Postal Telegraph Co. v. Newport, 247 U. S. 464, and cases cited; Great Northern Railway Co. v. Donaldson, 246 U. S. 121; Baltimore & Ohio Railroad Co. v. Whitacre, 242 U. S. 169).

The opinion prepared by the Commissioner of the Supreme Court of Missouri in this case is somewhat obscure, and there is in consequence some difficulty in ascertaining the exact basis upon which that Court rested its judgment in this case.

Enough appears, however, we think, to make it plain that the Missouri court has herein preferred its own views over those prevailing here as to (a) the duties of railroads in the operation of switch engines in the yards; (b) the risk which employes of such assume, and (c) as to the so-called last-chance or humanitarian doctrine dealt with by the state court in the discussion of this case.

For, an examination of the discussion of these three questions here and there shows a disharmony in the views prevailing, as will be made to appear.

As to Negligence of the Receiver.

This Court examined the question of yard operations in Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478, l. c. 482-483, where are these observations:

"Tried by this test there was no sufficient evidence of any negligence on the part of the railroad company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and of his witness was too slight. A railroad yard where trains are made up necessarily has a great number of tracks and switches close to one another, and anyone who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of a form in common use and was, to say the least, quite as fit for its place and purpose as an upright switch would have been. It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care; and it was unnecssary, in order to work it, to stand, as the plaintiff did, at the end of the handle, next the adjacent track."

The subject was again considered in Aerkfetz v. Humphreys, 145 U. S. 418, from which we also quote (pp. 419-420):

"There is little dispute in the testimony and the facts, as disclosed, are plainly these: The Delray yard is in the western part of the City of Detroit. In it were twelve tracks and sidetracks, and the yard was used for the making up of trains. A switch engine

was employed therein, and, as might be expected, was constantly moving forwards and backwards, changing cars and making up trains. Plaintiff was a repairer of tracks. He had been employed there about eighteen months, and was familiar with the manner in which the work was done. The yard was about a quarter of a mile in length. The tracks were in a direct line east and west, with nothing to obstruct the view in either direction. At the time of the accident plaintiff was working near the west end of the yard, when a switch engine pushing two cars moved slowly along the track upon which he was at work, the speed of the engine being about that of a man walking. Plaintiff stood with his back to the approaching cars, and so remained at work without looking backward or watching for the moving engine until he was struck and run over by the first car.

"Upon these facts we observe that the plaintiff was an employe, and, therefore, the measure of duty to him was not such as to a passenger or a stranger. As an employe of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed, not greater than that which was customary, and that which was necessary in the making up of trains. For a quarter of a mile east of him there was no obstruction, and by ordinary attention he could have observed the approaching cars. He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. With that knowledge he places himself with his face away from the direction from which cars were to be expected, and continues his work with-

out ever turning to look. Abundance of time elapsed between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employe, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

Such are the views of this Court as to the duty of the parties under the circumstances here in question.

On that same subject the Supreme Court of Missouri in the case at bar expresses itself thus (R. 385):

" 'Irrespective of any statute on the subject, the starting or running of a switch engine in a switch yard filled with a network of tracks upon which cars and engines are constantly moving and in which yardmen are constantly at work, without the ringing of a

bell or blowing of a whistle, is evidence of negligence.' This statement is adopted and expressed as the rule by Mr. Thompson in his work on Negligence, Section 4489. (See, also, Kippenbrock v. Railroad, 270 Mo. 479, 483, 194 S. W. 50, and Greenwell v. Railroad [Mo.], 224 S. W. 404, 407, and cases cited.)"

The result is that the Supreme Court of Missouri has disposed of this case on the fundamental basis that obligations rested upon the Receiver toward the respondent as a matter of law, with respect to signaling the movement of engines and cars in the switching yard, which this Court has declared to be nonexistent.

Assumption of Risk.

The Supreme Court of Missouri adheres to the doctrine that the servant does not assume the risk of injury from conditions which ordinary care on the part of the master would require him to obviate, even though the servant have full knowledge of the situation and the risk. This Court *contra.* The opinions in Pryor v. Williams, 272 Mo. 613, 254 U. S. 43, sufficiently illustrate this conflict of view. The question seems to arise upon this record in three aspects:

(a) The trial court authorized the jury to convict the Receiver of negligence by reason of the relative spacing of these switch tracks. While the Supreme Court of the state did not in terms deal with the question, its affirmance of the judgment was in necessary effect an affirmance

of the soundness of the charge to the jury in this respect. But elemental principles often declared by this Court demonstrate that the respondent, familiar as he was with this situation, assumed whatever risk to himself arose therefrom (Pryor v. Williams, 254 U. S. 43, and cases cited; Boldt v. Pennsylvania Railroad, 245 U. S. 441, 445).

(b) The Missouri Court, in dealing with the contention of the petitioner that the respondent assumed the risk arising from shunting cars, said (R. 386):

> "The fallacy of this contention is that by shunting the cinder cars in the nighttime onto the track where it was known that plaintiff was working, without a light or a man on the cars and without warning of any kind, appellant created an unusual hazard."

Of course, the question as to whether or not this was an unusual hazard depends upon what had been the previous practice, as to which we submit:

1. On the uncontradicted evidence the constant practice was to shunt cars without a man or a light thereon.

2. The only warning of such intended movements of which there is any pretense in the testimony is the statement of the plaintiff and his son that, if in the course of their activities, the switchmen chanced to pass near the plaintiff they were wont to tell him of an intention to presently shunt cars in the vicinity; *but, if they did not pass near him, no warning was given.* According to the undisputed facts, on the present occasion, the men did not

pass the plaintiff in the course of their work and hence did not speak to him. On plain principles the risk of shunting cars without this warning was one which the plaintiff was constantly undergoing; he knew that the men were in the yard; he knew that they had not been near his own location and that no opportunity had been afforded them to advise him whether they intended to shunt cars onto the adjoining tracks; and he, therefore, knew that according to the practice prevailing in the yard he must look out for himself in that respect.

With respect to the absence of a man with a lantern on these cars, upon which the Supreme Court based its opinion in large measure that this was an unusual hazard, there is no conflict in the record. There is simply and bluntly no sort of evidence from which it could be found that there was any practice in the yard to have men ride shunted cars with or without lanterns. The evidence is all one way, and all the other way on this proposition. So far as that phase of the opinion of the state court is concerned, the danger was indisputably a usual one. So far as concerns some special warning from his fellow workers, the danger was a usual one, because the respondent knew that he only had warning of shunted *cars when the men were passing around him, and that they had not passed around him on this particular night.*

The ruling of the state court that this was an unusual danger is, therefore, without support in the testimony. On correct principles such movements were one of the

risks of the employment which the respondent understood and assumed, under repeated decisions of this Court.

(c) Perhaps the most obvious error in dealing with this question, to be found in the opinion of the Missouri court, is its observations with respect to the testimony offered by the petitioner showing that the operation which resulted in the accident to the respondent was exactly of the type of that carried on in the yard all the time, and that no custom or practice existed to warn employes of switching movements. Such was, in fact, the overwhelming weight of the testimony. Dealing with that subject, the Court said (R. p. 386):

> "If it be true, as contended by appellant, that according to the practice in defendant's yard cars could be shunted dangerously near to the place where plaintiff was working without any warning to him or knowledge of such custom or practice on his part, *then the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and he did not assume the risk.*"

Here the Missouri court applied its own rule with respect to assumption of risk, rather than that to be extracted from the utterances of this Court on the same subject. As appears from the utterances in Pryor v. Williams, *supra*, the Missouri rule is that the servant is incapacitated to assume the risk of the master's failure to exercise ordinary care to provide the servant with a safe

place to work. The Missouri rule is elaborately set forth in Tetwiler v. Railroad, 242 Mo. 187, cited in the opinion of that court as authority for the disposition of this case. And under that rule the declaration above quoted may have been well enough. But under the utterances of this Court (and most others) the deliverance is unsound (Boldt v. Pennsylvania Railroad, 245 U. S. 441, 445, and cases cited). Here is the crux of this case, and, in large measure, the turning point of the case in the opinion of the Missouri court. Under the rule adhered to by that court if the practice of shunting cars without warning, and of moving engines, with or without cars, without signaling, resulted in making the place of employment less safe than it would have been if these precautions had been observed, the servant, even though with full knowledge and understanding, is incapacitated to assume the risk. Under repeated utterances of this Court if such was the practice in the yard, to the knowledge of the respondent, he assumed the risk of injury therefrom.

Last-Chance Doctrine.

The Missouri formula for the application of this doctrine is that if the defendant (or its representative) either actually saw the peril of the respondent, *or by the exercise of ordinary care might have ascertained it,* steps must be taken to avoid it (State ex rel. v. Trimble, 304 Mo. 533, 543). It was so applied in the charge to the jury by the trial court and the affirmance of the judgment by

the Supreme Court of the state in necessary effect affirmed the soundness of the charge in this respect.

But the decisions here require actual knowledge of the conditions to bring that rule into play, and do not admit of the application thereof to a mere failure to ascertain the perilous situation (St. Louis etc. Ry. Co. v. Shumacher, 152 U. S. 77, 81; Inland etc. Steamship Co. v. Tolson, 139 U. S. 551, 558).

In dealing with that question in the case at bar the Missouri court made these observations (R. 389, 390):

> "The evidence shows, without any controversy, that Murdock, the switch foreman, saw and knew of the plaintiff's perilous position in the unlighted yard between the tracks and must have known that the track was not clear, and should have realized that to undertake, in these circumstances, to send the blind cars noiselessly past plaintiff without warning exposed him to an unknown peril. * * * Murdock saw plaintiff in this perilous condition and could have called to him or warned him, but did not do so."

This serves to mark the most serious departure of the learned Commissioner who wrote the opinion from the established facts in the case. As has been pointed out in the petition for the writ, with references to the record, only Murdock, the foreman of the switching crew, saw the respondent at all; and this whole matter rests upon his testimony alone. He saw a lantern which he assumed to be carried by the respondent. That the respondent was in a

position of peril, or oblivious to the switching operations going on, Murdock did not know, and, in the very nature of things, could not possibly have discovered.

Respectfully submitted,

WALTER A. EVERSMAN,
JAMES C. JONES,
EDWARD C. CROW,
LON O. HOCKER,
FRANK H. SULLIVAN,
Counsel for Petitioner.

FILED
NOV 23 1927
CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 160

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
Petitioner,
vs.
HILBERT STUART ALLEN,
Respondent.

BRIEF AND ARGUMENT FOR PETITIONER.

WALTER A. EVERSMAN,
JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
Counsel for Petitioner.

(32,890)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 823.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
Petitioner,

vs.

HILBERT STUART ALLEN,
Respondent.

BRIEF AND ARGUMENT FOR PETITIONER.

HISTORY OF THE CASE.

The respondent, Allen, brought this action in the Circuit Court of the City of St. Louis, Missouri, against a Receiver, who was then operating the petitioners' railway system, claiming damages for personal injuries suffered while in the employ of the Receiver. Pending the action the Receiver was discharged and possession of its road restored to the petitioner upon condition that the latter

assume obligations incurred by the Receiver while engaged in the operation of the road (R. 22). Thereafter the petitioner was substituted for the Receiver as defendant in the instant case (R. 4).

Following a trial there was verdict and judgment for the respondent (R. 16), from which the petitioner appealed to the Supreme Court of the state (Id.). In that court two opinions (R. 256, 266) were written by a Commissioner of the court (one in response to a petition for rehearing), the judgment was affirmed (R. 255), a rehearing was denied October 21, 1926 (R. 265), and in apt time, to wit, January 10, 1927, this writ of certiorari was applied for, and thereafter allowed (R. 288).

The Facts.

The petitioner owns, and the Receiver was operating at the time of the accident of respondent, a railroad switching yard at Madison, in the State of Illinois, in which trains were regularly made up for movement over the railroad of the petitioner. A portion of this yard consisted of a lead track with various sidetracks, each such sidetrack running off the lead track and parallel with the other sidetracks, and connected with the lead track by means of switch stands. A plat appearing in the record, at page 86, will serve to show the relative location of the switch tracks so far as necessary to the case.

Photographs following page 154 will show the spacing between these tracks when occupied by cars, and the rela-

tion of the space remaining to the space occupied by a human body, and will also visualize the construction of the two cinder cars the movement of which resulted in the injuries complained of.

With these preliminary observations we submit the statement of the Commissioner of the state court as to the evidence offered by the parties litigant at the trial, in so far as the same seems consistent with the record, indicating in notes following the respects wherein we think the learned Commissioner has misconceived the record.

Plaintiff's Evidence as Stated by the Commissioner.

(R. 266 et seq.)

"The testimony for plaintiff is that he had been employed as a car checker for about eighteen months in the yards of the company at Madison, Illinois. There were a number of sidetracks connected with a lead track running east and west. Plaintiff's hours of labor were from 11 p. m. to 7 a. m. His duties were to check the cars in freight trains, note the numbers and initials of cars and numbers of seals on sealed cars and their destinations, and write out a train sheet so the conductor of the train could recheck and get ready to leave on time. Plaintiff reported to the yardmaster, Flack, and went to work at 11 p. m. on October 26, 1922. He checked a train of about thirty-four cars on track 6, and while preparing the train

sheet the train dispatcher sent in an order to let that train go out with only nineteen cars and pick up others at Edwardsville. While Murdock, the switch foreman, and plaintiff were in the office of the yardmaster Flack ordered Murdock to make up a train on track 5 to leave at 2:30 a. m. for points in Indiana and Ohio and directed plaintiff to check the cars.

"Plaintiff began at the west end of the train, between tracks 4 and 5 on the north side of the cars, facing the south, with his left arm through the bail of his lantern and the lantern on his shoulder. He was proceeding in the customary manner, standing about three feet back from a car he was checking, when, about 1:15 a. m., he was struck, run over, dragged and injured by a cinder car which was kicked or shunted west by the switching crew and engine on track 4, without any warning whatever. There was no man or light on the cinder car. Murdock, the foreman of the switching crew, knew that plaintiff was engaged in his duties between tracks 4 and 5; in fact, saw him at a distance of 100 or 125 yards (or one whom he assumed was the plaintiff), with his lantern, engaged in checking the train, when he (Murdock) cut loose two cinder cars from a string of cars being moved west on the lead track and shunted them onto track 4, where they moved west at a speed of four to six miles per hour and ran over the plaintiff. They made little, if any, noise and were not heard or seen by plaintiff. Murdock's purpose was to make up a local freight train on

track 4, due to leave at 7 a. m. Track 4 was clear when plaintiff began to check the train on track 5, and he believed the switching was all done, and was not informed there would be other switching in the yard before the departure of the train which he was checking. The clearance between the car plaintiff was checking and the cinder cars was about 2 feet 9 inches, without considering the grab irons on the cinder cars, which projected 4¼ inches from each corner.

"The switch yard was not lighted and there was no moon on the night plaintiff was injured. When the engine was about to be moved it was customary to ring the bell if anyone was working near by. It was customary, when plaintiff was engaged in checking cars, for passing switchmen to tell him if cars were to be switched by the place where he was working; that when he knew cars were coming down on another track plaintiff would flatten himself up against the car he was checking and allow them to pass him; that he had only half the usual time in which to do his checking and get the train sheet to the conductor; that when Murdock, the switch foreman, was about to cut the cinder cars loose from a string of cars which the engine was pushing on the lead track he gave the usual highball and stop signals with his lantern, which were relayed to the engineer (who was on the north side of the engine and could not see plaintiff); these signals were received by the engineer, the cars were cut loose and shunted west on track 4, but no signal of this

movement was given by bell, whistle or otherwise; that Murdock, from his position, could have called to plaintiff, but he did not do so *because he did not think plaintiff was in any danger from the cars;* * * *

"Further testimony is that plaintiff's duties took him into all parts of the yard where he knew the crew would be switching cars, but ordinarily trains would be made up before he would go out to check them; that they hardly ever made up another train on a track where he was checking a train. It is conceded that the company had no rules regulating the movement of the engine or cars in making up trains or shunting cars in the yard, or for giving signals to car checkers or other employes in the yards to warn them of such movements.

"Plaintiff did not see or hear the cinder cars moving toward him. He felt something strike him and he was at once thrown down, run over and dragged under the car."

Defendant's Evidence as Stated by the Commissioner.

(R. 268 et seq.)

"The evidence for the defendant, including the testimony of one or two members of the switching crew, who were plaintiff's witnesses, is that it is not usual or customary to give car checkers or other employes in the yard notice or warning by bell, whistle, or otherwise, of the movements of the engine or cars in the yard, or of the shunting or kicking of cars on or along a track or side-

track; that it is the custom for all such employes to look out for their own safety during such operations; nor is it customary to put a light or to station a man on the end of a car that is being so moved or shunted to warn employes in the yard. No member of the switching crew, except Murdock, the foreman, saw plaintiff in the yard, or knew that he was engaged in checking the train on track 5 at the time the cinder cars were shunted onto track 4, or knew that such movement would be attended with risk or danger to him" (R. 378, 379, 380).

Additional Observations.

1. The plaintiff's work as car checker during the eighteen months of his employ was regularly performed at night (R. 61).

2. The manner in which the two cinder cars were handled and moved on this occasion was the usual and customary method of handling cars in the yard when occasion required (R. 68).

3. Some, at least, of the cars which the plaintiff was engaged in checking were to move in interstate commerce (R. 90, 39).

4. The plaintiff, as a witness, described the night as just an ordinary night, except that the moon was not shining (R. 91). Other witnesses described it as a clear, starlight night (R. 50, 134).

5. The effect of the testimony offered at the trial by the plaintiff as to warning from switchmen, when cars were

to be shunted or switched in his vicinity, is overstated by the learned Commissioner of the State Court who prepared the opinions of that tribunal. The plaintiff himself said *if the switchmen happened to pass in his vicinity* they would tell him they were presently intending to switch other cars onto the track on which he was working, or onto adjoining tracks, if such were the fact (R. 94, 95). His son, who was a switchman, and who testified for the respondent, made the same statement, but added that *if the switchmen were not brought near the checker in the course of their duties he was not furnished with such information* (R. 117). There was no other testimony on that subject, and the undisputed facts show that on the night of the accident the switchmen were not in the plaintiff's vicinity after he began his duties (R. 117 et seq.).

6. The plaintiff knew the switching crew was working in the yard and making up a train in his vicinity (R. 105). His testimony shows that he made no effort to keep himself informed as to what this switching crew was doing (R. 87-107).

7. The statements of the Commissioner as to the knowledge of Murdock, the foreman of the switching crew, of the position of the plaintiff at the time the cars were shunted onto track No. 4 on the orders of Murdock is not supported by the record. The photographs make plain the fact that an employe engaged in switching cars has ample room between the tracks without subjecting himself to risk. Murdock was one hundred and twenty-five

yards away from the plaintiff at the time the two cars were, upon his order, shunted onto the track adjoining that at which the plaintiff was working. The only witness who testified to what Murdock could or could not observe was Murdock himself. All he could see was a lantern, which he assumed to be carried by the plaintiff merely from his knowledge of the plaintiff's duties. Murdock did not know, and could not possibly have ascertained, that the plaintiff had placed himself so near to track No. 4 as to be in danger from the movement of cars thereon. On this there is no conflict in the testimony (R. 52, 65, 68, 70 and 77).

8. The clicking of the car wheels over the joints of the rails was audible one or two car lengths away (R. 133).

9. Murdock, the foreman of the switching crew, uncoupled the two cinder cars from the train of twenty or twenty-five, of which they were the rearmost, signaled with his lantern for the kick from the engine, signaled for the stop when the engine had communicated the desired *momentum* to the two cars, and then signaled for the engine to proceed in the reverse direction. All these signals he gave with his lantern, not directly to the engineer, but to Allen, the switchman, who repeated them in relay with his lamp (R. 31, 32, 33, 66, 67).

The Charge.

The trial court authorized the jury to convict the Receiver of negligence in the following respects (R. 241 *et seq.*):

(a) If the jury believed the space between the tracks in the yard was so restricted as to be dangerous to the plaintiff;

(b) If Murdock, in the act of causing the cars to be shunted onto the adjoining track, was aware that the respondent had placed himself in a position of peril and was oblivious thereto, *or if Murdock might have ascertained this situation by the exercise of ordinary care;*

(c) If the jury regarded it as dangerous to shunt the cars onto the adjoining track without lights and with no one riding thereon;

(d) If the movement was made without causing the bell to be rung on the engine;

(e) If the place where plaintiff was working at the time he was injured was dark and unlighted;

(f) If the moving cars, when "kicked" down track No. 4, and at the time of and just before striking plaintiff, were unlighted, and had no one riding on said cars.

The trial court refused:

(a) To direct a verdict for the defendant (R. 241, 247);

(b) To withdraw from the jury the charge of negligence that the defendant failed to ring the bell or to have a man ride the shunted cars (R. 248);

(c) To withdraw from the jury the charge of negligence that the defendant failed to maintain a proper, adequate and safe width between the tracks (R. 249);

(d) To withdraw from the jury the charge of negligence that the employes of the Receiver saw, or by the exercise of ordinary care could have seen, the plaintiff in a position of peril in time to avoid injuring him (Id.).

(e) To charge that if it was the custom of the defendant in its yards at Madison, Illinois, not to give warning to car checkers of car movements therein, and the plaintiff knew of such custom, he assumed the risks incident to that method of operation (R. 250);

(f) To withdraw from the jury the charge of negligence that the defendant failed to promulgate safe and proper rules for the protection of persons working in the defendant's yards at Madison, Illinois (R. 248).

The Opinion of the State Supreme Court.

The State Supreme Court affirmed the judgment of the trial court. Not all the assignments of error urged by the defendant were discussed in the opinion of the learned Commissioner who spoke for the Court. Indeed, with no intention unduly to criticise the opinions, we are constrained to say that the reasoning thereof is somewhat obscure, and, in consequence, we find it difficult to state just what principles of law the Court has laid down.

In the original opinion these propositions seem to be declared:

(a) That it was negligence on the part of the defendant to switch cars in its yards at Madison, Illinois, without ringing the engine bell or blowing the whistle so as to warn employes in the yard thereof.

(b) That shunting the two cars along the adjoining tracks without a light or a man riding them created an unusual hazard, which the plaintiff did not assume, even though the plaintiff knew that it was the custom of the defendant so to shunt cars in its yards at Madison, Illinois.

(c) If it was the custom so to shunt cars without a light or a man riding thereon or without warning, then the Receiver had not provided the plaintiff with a safe place to work, and the risk arising from the failure so to do was not assumed by the plaintiff.

(d) Upon these principles it was affirmed by the State Court that the verdict and judgment below were for the right party, whether the rulings below on the charge were well or ill (R. 256-265).

On a petition for a rehearing, proposition (c) was modified (R. 274) so as to assert that the custom of shunting cars without warning created a dangerous hazard which the plaintiff did not assume if he had no knowledge of the custom (R. 274).

SPECIFICATIONS OF ERROR.

The errors assigned in the petition for the writ, and now urged, are:

I.

The judgment of affirmance, although not dealing with the question, necessarily affirmed the action of the lower court in authorizing the jury to convict the Receiver of negligence based upon the manner in which the engineers of the petitioner had located these tracks with respect to each other, whereas, on correct principles, often declared and enforced by this Court, the respondent assumed whatever risk was involved in working under such conditions.

II.

The State Supreme Court affirmed the view of the court below that it was negligence on the part of the Receiver not to have someone ride these shunted cars with a light and so as to control their movements, ignoring the uncontradicted testimony that the custom of the yard was to do as was done on this occasion, and the respondent must needs have known the fact and assumed the risk under principles often declared by this Court.

III.

The Supreme Court approved and applied to the case (R. 385) its own previously expressed view (Tetwiler v. Railroad, 242 Mo. 178) that it was negligence to move the switch engine without ringing the bell, rather than the view of this Court (Randall v. Baltimore & Ohio Railroad Co., 109 U. S. 482; Aerkfetz v. Humphreys, 145 U. S. 418) that the ringing of the bell in railroad switching yards as a warning to employes leads to confusion and fails, therefore, of its purpose, and that negligence cannot be predicated upon a practice not to warn under such circumstances.

IV.

The Supreme Court of the state erred in classing the shunting of these two cars without a man or light on them as an unusual hazard which the respondent did not assume, in view of the uncontradicted testimony that it was the custom and practice so to do in the defendant's yards, and to the full knowledge of the plaintiff during the eighteen months he had worked in the yard as a car checker.

V.

The Supreme Court erred in holding that a practice of shunting cars onto adjoining tracks without warning de-

prived the plaintiff "of a reasonably safe place to work" and in consequence "he did not assume the risk" of injury therefrom.

VI.

The Supreme Court erred in ruling that the foreman of the switching crew saw or should have seen the plaintiff in a perilous position and should have taken steps to avoid injuring him.

BRIEF.

I.

The plaintiff, checking cars, some of which were to move in interstate commerce, was engaged in such commerce within the Federal Employers' Liability Act.

Pecos etc. Railway Co. v. Rosenbloom, 240 U. S. 439.

II.

In such cases certiorari lies to review the judgment of the highest court of the state.

Judicial Code, Sec. 237;
Chicago etc. Railway Co. v. Coogan, 271 U. S. 474.

III.

The facts will be reviewed here to determine if they support the judgment below.

Chicago etc. Railway Co. v. Coogan, supra, and cases cited.

IV.

The rules of law enforced here control the rights of the parties.

New Orleans etc. Railway Co. v. Harris, 247 U. S. 371;
Chicago etc. Railway Co. v. Coogan, supra.

V.

The plaintiff assumed whatever risks were involved in the manner in which the yards were constructed and the usual train movements therein.

Boldt v. Pennsylvania R. R. Co., 245 U. S. 445;
Chesapeake etc. Ry. Co. v. Nixon, 271 U. S. 219;
Tuttle v. Milwaukee Rwy., 122 U. S. 189;
Randall v. Baltimore etc. Railway Co., 109 U. S. 478;
Connelley v. Pensylvania R. Co., 201 Fed. 54, approved in Railway Co. v. Nixon, 271 U. S. 219.

VI.

In switching operations the lack of signals is not negligence.

Aerkfetz v. Humphreys, 145 U. S. 420;
Chesapeake etc. Ry. Co. v. Nixon, 271 U. S. 219;
Reading Co. v. Haldeman, 20 F. (2d) 53 (C. C. A. 3rd).

VII.

Those in charge of the train movement could not be required to take special efforts to avoid injury to the plaintiff unless his peril was known to them.

St. Louis etc. Ry. Co. v. Shumacher, 152 U. S. 77;
Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551;
Aerkfetz v. Humphreys, 145 U. S. 420.

VIII.

An experienced railroad employe who is familiar with the custom of switching cars without providing them with a lookout or lights assumes the risk of injury resulting from such custom and is precluded from recovering for injuries suffered by reason thereof under the Federal Employers' Liability Act.

Southern Pacific Co. v. Berkshire, 254 U. S. 415;
Seaboard Air Line Ry. v. Horton, 233 U. S. 492;
Jacobs v. Southern R. R., 241 U. S. 229;
Gilmer v. Yazoo & M. V. R. Co., 4 F. (2nd) 963 (certiorari denied, 268 U. S. 639).

ARGUMENT.

Preliminary Observations.

The plaintiff was engaged in checking cars, some of which were to move in interstate commerce. The controversy is, therefore, controlled by the Federal Employers' Liability Act. It was so held in Pecos etc. Railway Company v. Rosenbloom, 240 U. S. 439. The right of review by certiorari here is settled (Judicial Code, Sec. 237; Chicago etc. Railway Co. v. Coogan, 271 U. S. 474).

The facts in the case are here open to inquiry. As said in Chicago etc. Railway Co. v. Coogan, 271 U. S. 472, 474:

> "This Court will examine the record, and if it is found that as a matter of law the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed (St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265, 277; New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367, 371; New Orleans & N. E. R. R. Co. v. Scarlet, 249 U. S. 528)."

Nor are the rights and liabilities of the parties litigant to be determined by the rules of law declared and enforced in the local jurisdiction where the controversy arose.

As was observed in New Orleans etc. Railway Co. v. Harris, 247 U. S. 367, l. c. 371:

> "In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; * * * ."

To like effect is Chicago etc. Railway Co. v. Coogan, supra.

We think the record in this case discloses that the Missouri courts have applied principles of law which are alien to this jurisdiction in respect of the duties and obligations of interstate rail carriers in yard operations, as well as in respect of the risks assumed by the employes of such carriers when they undertake the employment. The two opinions of the Commissioner are apparently based in large measure upon the so-called last-chance, or humanitarian, doctrine, which this Court in Pryor v. Williams, 254 U. S. 43, expressly repudiated, in so far as its application to cases coming under the Federal Employers' Liability Act is concerned, and which, when applicable, rests upon principles here differing from those prevailing in Missouri.

Yard Construction.

The trial court instructed the jury to find the defendant guilty of negligence, if it found that the space between the switching tracks in the yard was too narrow (R. 242-3).

The defendant's request that the Court charge the jury that the plaintiff could not recover because of the "width between the tracks" was denied (R. 249 F).

As to the claim that the space between the tracks was too narrow, it is to be observed that, while there was testimony as to how a car checker would stand, how he would carry his lantern, etc., etc., the photographs following page 154 of the record conclusively demonstrate that the space between the tracks was sufficient for a man to pass along and take down the numbers and initials of cars without risk from movements on the adjoining track if he but observed due care to keep himself within the safety zone. There was, therefore, really no support in the record for the claim—quite apart from the question of the risk assumed by plaintiff—that the tracks in the yards were too close for a car checker to work in safety.

Even if it were conceded that the defendant was negligent in the construction of its yards, this Court has repeatedly held that the risks incident to such construction are assumed by the employe and that the employe is precluded from recovery for injuries resulting therefrom.

The plaintiff had worked daily for a year and one-half or more in these yards and among these tracks and must have necessarily observed their relative location.

The Commissioner did not definitely repudiate the principle of law just recited, but the affirmance of the judgment below was in effect a tacit approval of the ruling of the trial court that the plaintiff had a right of recov-

ery because of the narrow space between the tracks and the yard, notwithstanding his intimate knowledge and daily observation of the construction of the tracks.

The conflict between the rule of assumption of risk, as applied by the Missouri Supreme Court and as applied by this Court, is evidenced by the decision in Williams v. Pryor, 272 Mo. 621, and Pryor v. Williams, 254 U. S. 43. The Missouri Court, in the former case, expressed itself thus:

> "It is the unbroken rule in Missouri that the servant never assumes the risk, where such risk grows out of the negligence of the master (Fish v. Railway, 263 Mo., l. c. 125; Charlton v. Railroad, 200 Mo., l. c. 433; Patrum v. Railroad, 259 Mo., l. c. 124; George v. Railroad, 225 Mo., l. c. 407). These cases and the cases cited therein thoroughly state the rule and reasons therefor. Thus, in the Charlton case, it is said, 'Assumption of risks rests on contract—negligence rests in tort (Dale v. Hill-O'Meara Construction Co., 108 Mo. App., l. c. 97). The servant, when he enters his master's employ, impliedly agrees with him, for the compensation named, to assume the risk of usual dangers incident to the work. But the servant does not assume the risk of the master's negligence for a very good reason, and that is because it is a fundamental proposition that it is against public policy for a master to contract against his own negligence. So, too, in the assumption of risks by a servant, it is well to consider a certain assumption by the master, and that is, that the master impliedly contracts with the servant that

he will exercise ordinary care to protect such servant from injury by providing a reasonably safe place for him to work. When these two assumptions are considered as proceeding hand in hand, it will be perceived that the risks assumed by the servant are those risks alone which remain after the master has exercised ordinary care.' "

That judgment was reversed by this Court because the views expressed and applied did not conform to the settled rule of decision here. The rule here is, under the Federal Employers' Liability Act as at common law, "that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious and fully known and appreciated by him."

Boldt v. Pennsylvania R. R. Co., 245 U. S. 445;
Chesapeake etc. Ry. Co. v. Nixon, 218 U. S. 219, and cases cited.

While the Missouri Court did not, in its opinion, expressly repudiate the rule of this Court as to the assumption of risk in cases coming under the Federal Employers' Liability Act, its judgment is squarely in conflict therewith.

This aspect of the case, therefore, finds its parallel in Pryor v. Williams, *supra.*

True, the trial court gave an instruction on this question (R. 246), but this instruction conflicts with that given for the plaintiff (R. 243); and the request to withdraw

that entire question from the jury, as should have been done, was denied (R. 249 F). It is patently impossible for the plaintiff to have worked daily for a year and a half in this yard without ascertaining its construction. Wherefore he assumed whatever risk this involved and the whole question should have been withdrawn from the jury.

Absence of Signals.

The jury were authorized to convict the Receiver of negligence because the bell upon the engine was not rung during the car movement of which respondent complains (R. 244), and the trial court refused to charge that it was not the duty of the Receiver to cause this to be done (R. 248 D and E). The Supreme Court of the State, in both its original (R. 263) and final opinions (R. 273) affirmed this ruling upon its concept of the common-law duty of the Receiver in switching operations, saying:

> "Irrespective of any statute on the subject, the starting or running of a switch engine in a switch yard filled with a network of tracks upon which cars and engines are constantly moving and in which yardmen are constantly at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence."

This Court reached a diametrically opposite conclusion in Aerkfetz v. Humphreys, 145 U. S. 418, 420, saying:

> "Under such circumstances, what negligence can be attributed to the parties in control of the train or the

> management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion."

In Connelley v. Pennsylvania R. Co., 201 Fed. 57, the Circuit Court of Appeals for the Third Circuit held:

> " 'An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns and waving flags, designed to cover the erratic movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation.' "

That opinion was cited with approval here in Ohio etc. Railway Co. v. Nixon, 271 U. S. 219.

The judgment of the Missouri Court, both in effect and in express pronouncement, is directly in conflict with the views of this Court on this phase of the case.

Car Movement.

The jury were permitted to consider whether the shunting of the cars along the track without a man or light thereon was an act of negligence (R. 244), notwithstanding the request of defendant's counsel that this element be

removed from the consideration of the jury (R. 248 D and E). The State Court dealt with this question in both opinions. In the original opinion (R. 264) the Commissioner said:

> "The fallacy of this contention is that by shunting the cinder cars in the nighttime onto the track where plaintiff was working, without a light or a man on the cars, and without warning of any kind, appellant created an unusual hazard. If it be true, as contended by appellant, that according to the practice in defendant's yard, cars could be shunted dangerously near to the place where plaintiff was working without any warning to him, then the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and he did not assume the risk. The contention is clearly opposed to the rulings of the Proffitt and Tetwiler cases, supra."

The Tetweiler case, 242 Mo. 187, referred to in this excerpt, merely reaffirms the doctrine of the Missouri Supreme Court on assumption of risk. The Proffitt case (241 U. S. 461), referred to in the Commissioner's opinion, holds that the servant does not assume the risk of unusual hazards which are not obvious and of which he is unaware.

In the final opinion (R. 274) the State Court added to the excerpt just quoted the words shown in italics below (R. 274):

> "The fallacy of this contention is that by shunting the cinder cars in the nighttime onto the track where

it was known that plaintiff was working, without a light or a man on the cars, and without warning of any kind, appellant created an unusual hazard. If it be true, as contended by appellant, that according to the practice in defendant's yard cars could be shunted dangerously near to the place where plaintiff was working, without any warning to him *or knowledge of such custom or practice on his part*, then the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and did not assume the risk."

The qualifying words "without knowledge of such custom or practice on his part," if they were well founded under the testimony in this case, would bring the case within principles declared in the Proffitt case. There is, however, no support in the record for the statement that the plaintiff did not know of the practice of shunting cars without warning. The method employed of shunting cars at the time plaintiff was injured was precisely the same method that had been employed all the enghteen months plaintiff had been employed as a car checker in defendant's yards (R. 68). The only suggestion in the testimony that there was a practice of giving warning that cars were to be shunted was the testimony of the plaintiff (R. 94, 95) and his son, a switchman (R. 135), that if switchmen chanced, in the course of their labors, to pass near a car checker they might tell the car checker that they were intending presently to shunt cars in his vicinity; but they both said that unless switchmen chanced to pass no warn-

ing of such movement was given (R. 135). The learned Commissioner correctly stated the effect of the uncontradicted testimony when he said (R. 271):

> "The testimony of defendant showed that these tracks had been used fifteen years in the same condition in which they were at the time of plaintiff's injury; that plaintiff had worked in these yards at night, performing the same duties he was performing when he was injured, one and one-half years, and that his duties carried him to all portions of the yard; that he was thoroughly familiar with the movement of cars, and that he was aware that no signals were customarily given when cars were moved in the switch yards."

That these were the uncontradicted facts is shown by his further observations (R. 274):

> "There is really no controversy about the facts, the contention being that it was not customary to warn a car checker of the movement of cars in the switch yard; that plaintiff was required to look after his own safety; that he assumed the risk of being struck by the cinder cars, and that on the evidence the Court should have directed a verdict for the defendant."

The respondent had worked in the yard, in this same position, for a year and a half. He must have known the custom of the yard in car movements. Indeed, his own testimony, referred to above, shows that he did know it. The intimation that he may not have known of it has no support.

In Randall v. Baltimore etc. Railway Co., 109 U. S. 478, it is said:

> "Tried by this test there was not sufficient evidence of any negligence on the part of the railroad company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and of his witness was too slight. A railroad yard where trains are made up necessarily has a great number of tracks and switches close to one another, and anyone who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of a form in common use and was, to say the least, quite as fit for its place and purpose as an upright switch would have been. It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care: and it was unnecessary, in order to work it, to stand, as the plaintiff did, at the end of the handle, next the adjacent track."

In Aerkfetz v. Humphreys, 145 U. S. 418, it was observed, with respect to switch movements in yards:

> "There could have been no thought or expectation on the part of the engineer, or of any other employe, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circum-

stances what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

To like effect is Chesapeake etc. Railway Co. v. Nixon, 271 U. S. 219, and cases there cited.

The defendant requested the following charge on the question now under discussion:

"The Court instructs the jury that if you find from the evidence that it was the custom and method of the defendant, in the operation of its yards in Madison, Illinois, not to have the trainmen or the enginemen give warning to car checkers while they were in the performance of their duties in said yard, and that plaintiff knew of such custom and method on the part of the defendant, then the plaintiff assumed the risks and dangers incident thereto and cannot recover in this case upon the ground of the failure to warn him in connection with the switching of the cinder cars on track No. 4."

The trial court declined to give this charge.

It is obvious that this request embodied correct principles as applied to the conceded facts. In its final opinion the State Court recognized the propriety of the request (R. 278), but held that its refusal by the trial court was not error because it was covered by defendant's instruction No. 5, which was given. This latter instruction is set out by the Court in its opinion at page 276 of the record. It deals only with the construction of the track and has no reference to the operation of trains thereon. It is obvious that the two instructions cover entirely different and unrelated matters.

Last Chance.

We think the judgment of the Missouri Court is based largely on the Missouri last-chance or humanitarian doctrine, which, when applied to this case, would hold the defendant liable in damages if Murdock, the foreman of the crew, who gave the order for the shunting of the cars, saw, or *in the exercise of ordinary care should have seen* the plaintiff in a perilous position and took no steps to avoid the accident.

The trial court, by its charge, instructed the jury to find for the plaintiff if the employe of the Receiver, in charge of the car movement, knew, *or by the exercise of ordinary care to that end might have known, that the plaintiff* was in a position of peril and failed to take steps to avoid injuring him (R. 243).

This instruction was quite in keeping with the doctrine of the Missouri Court, just referred to, that, notwithstanding the negligence of the injured party in placing himself in a position of peril, if the defendant knew of the peril, *or by ordinary care might have learned of it*, in time to avoid it, there is a right of recovery. (See State ex rel. v. Trimble, 314 Mo. 533, 534.)

But the rule, under the decisions here, requires *actual knowledge of, and not merely negligence in failing to discover* the perilous situation in order to entitle the person who, by his own negligence, has placed himself in a position of peril, to recover.

> St. Louis etc. Ry. Co. v. Shumacher, 152 U. S. 77, 81; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 558.

On this subject the State Supreme Court said in its final opinion (R. 277):

> "Appellant's learned counsel argue that although defendant's employes knew of plaintiff's perilous position between the two tracks in the dark and unlighted yard, yet they contend that defendant had the right to expect a clear track, and that its employes in these circumstances might with impunity shunt these unlighted cars past plaintiff while he was so engaged, without any warning, and that by the custom and practice in the yard plaintiff was required to look after his own safety and that he assumed such unknown hazard as a risk incident to his employment. We are not dealing with a theory merely, but with a

condition. The evidence shows, without any controversy, that Murdock, the switch foreman, saw and knew of the plaintiff's perilous position in the unlighted yard between the tracks, and must have known that the track was not clear, and should have realized that to undertake, in these circumstances, to send the blind cars noiselessly past plaintiff, without warning, exposed him to an unknown peril."

And, again (R. 278):

"Murdock saw plaintiff in this perilous position and could have called to him or warned him, but did not do so. It was on this failure to warn, and not on the proximity of the tracks, that plaintiff's instruction predicated his right to recover. The proximity of the tracks made the shunting of the cars, without warning of any kind, an unusual hazard."

The statement of the Commissioner that in the argument before him defendant's counsel contended that, even though defendant's employes knew of plaintiff's perilous position between the two tracks, the defendant, nevertheless, owed plaintiff no duty to avoid the accident. Appellant's counsel made no such argument and does not so understand the law. Defendant's counsel has always maintained that, under the uncontradicted testimony in this case, there is absolutely no support for the statement that Murdock, the foreman of the crew, or any other of defendant's employes, knew that plaintiff was in a perilous position at the time of the shunting of the car.

In the second excerpt from the Commissioner's opinion the statement is again made that Murdock saw the plaintiff in a perilous position. This statement, as we have already said, is without support in the record.

Murdock was 125 yards away from the plaintiff when he directed the movement of the cinder car. The only witness who testified as to what Murdock could or could not observe on this occasion was Murdock himself. He testified that all that he could see was a lantern, which he assumed the plaintiff was carrying merely because he knew the plaintiff was working in that vicinity. As to whether the plaintiff was within or without the rails of track 4, or between that track and the adjacent one, Murdock did not know and, in the very nature of things, could not possibly have discovered (R. 52-64, 65-68-70-77). Murdock acted on that occasion upon the assumption that the plaintiff would protect himself as the shunted cars approached him—an assumption which this Court, in Aerkfetz v. Humphreys, 145 U. S. 418, 420, asserted a person in charge of a movement of cars under very similar circumstances was justified in making. The Court there said:

> "The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

As to the shunting of the cars without warning, the uncontradicted testimony in this case is, as has already been

noted, that it was the usual practice to shunt cars in the yard without warning and that the only time warning was given of such a movement was when the members of the switching crew chanced to pass in the vicinity where the car checker was employed, and that, in such cases, they might inform him that they presently intended to shunt cars in his direction. We have heretofore referred to the record in this respect (R. 94, 95-135).

General Observations.

The principles of negligence at common law which are controlling in this case are so widely divergent from the principles of the Missouri Supreme Court under the so-called "last-chance or humanitarian doctrine" that it is not surprising that a Missouri court should have a tendency to strain the facts in a case where it is required to apply principles with which it is not in sympathy. Certain it is (and we say it with the utmost respect for the Missouri Court and the learned Commissioner who wrote the opinion in this case) that we have seldom read a judicial opinion where salient facts as disclosed in the record have been so distorted.

The learned Commissioner, no doubt wholly unconsciously, but steeped in home principles, has substituted the facts of the Proffit case for the facts in the case at bar and then has applied to the substituted facts principles of law which lead to the same result that would be ob-

tained if rules declared by the Missouri Court were applied to the facts.

And it may be that, under the peculiar rules recognized by the Missouri Court as respects switching signals, safe place to work (a most misleading formula, because life itself is full of risks and there is no safe place to work), assumption of risk, last chance, etc., the opinions of the learned Commissioner have accurately disposed of the case.

But, far more surely, under the settled doctrines of this Court as applicable to these same propositions, the judgment of the State Court cannot be approved, but should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 823.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
Petitioner,

vs.

HILBERT STUART ALLEN,
Respondent.

BRIEF AND ARGUMENT FOR RESPONDENT.

THE OFFICIAL REPORT OF THE OPINION DELIVERED IN THE COURT BELOW.

Opinion of State Court.

The opinion of the Missouri court of last resort, review of which is sought by petitioner herein, was rendered October 21, 1926 (Rec., p. 265). It is set out in the transcript of record in this court, No. 823, pages 266 to 278, inclusive; is not officially reported in the Missouri Re-

ports, but is found in the Southwestern Reporter, Vol. 292, page 732; was concurred in by all the members of the Division (Rec., p. 279). A petition for rehearing was denied by the same Division (Rec., p. 265).

Although there had been no dissenting opinion filed by any member of the Missouri Supreme Court, petitioner (appellant in that court) filed a motion to set aside the judgment of the Supreme Court and transfer the cause to the Missouri court en banc (Rec., p. 279). This motion (Rec., p. 279), together with suggestions in support thereof which accompanied it (Rec., p. 281), brought before the Missouri Supreme Court every matter here urged under petitioner's "Specifications of Error," on page 13 of their brief and argument.

Apparently, no member of the division of the Supreme Court from which the opinion emanated agreeing with petitioner's reasoning (as our Missouri appellate procedure requires in order to so transfer the cause), this motion was likewise denied (not set out in transcript of record No. 823) but appearing on page 411 of certified copy of transcript of proceedings below, which certified copy this Court, in its order filed February 28, 1927, granting writ of certiorari (Rec., p. 288), ordered to be treated as filed in response to such writ, and which is dated December 20th, 1926, and recites that "the Court, having seen and fully understood the appellant's motion to transfer this cause to the Court en banc, doth order that said motion be, and the same is hereby, overruled."

JURISDICTIONAL MATTERS.

Grounds on which jurisdiction invoked by petitioner.

The judgment dated October 21, 1926.

Specific claims and ruling in lower court as basis of jurisdiction (as claimed by petitioner).

Lack of jurisdiction (as claimed by respondent).

Grounds on Which Jurisdiction Invoked by Petitioner.

The Judgment, Review of Which Is Sought.

The judgment, review of which petitioner seeks, is contained in transcript of record in this cause (pages 266 to 278, inclusive). It was rendered and filed by the Missouri Supreme Court on October 21, 1926 (Rec., p. 265); is not contained in the official volumes of Missouri Reports, but appears in 292 S. W. 732.

Specific Claims and Rulings in Lower Court as Basis of Jurisdiction.

(As claimed by petitioner.)

The petition for writ of certiorari (p. 16) contains the following:

> A. "The jurisdiction of this Court is invoked herein on the ground that the Missouri Supreme Court **failed and refused to follow the previous rulings of this Court** on the question of the liability of petitioner under the Federal Employers' Liability Act."

In petitioner's brief and argument (p. 20) the following appears:

> B. "We think the record in this case discloses that the Missouri courts have applied principles of law which are alien to this jurisdiction in respect of the duties and obligations of interstate rail carriers in yard operations, as well as in respect of the risks assumed by the employes of such carriers when they undertake the employment. The two opinions of the Commissioner are apparently based in large measure upon the so-called last-chance or humanitarian doctrine, which this Court in Pryor v. Williams, 254 U. S. 43, expressly repudiated in so far as its application to cases coming under the Federal Employers' Liability Act is concerned, and which, when applicable, rests upon principles here differing from those prevailing in Missouri." * * *

And on page 21 the following:

> C. "Even if it were conceded that the defendant was negligent in the construction of its yards, this Court has repeatedly held that the risks incident to such construction are assumed by the employe and that the employe is precluded from recovery for injuries resulting therefrom."

From a careful examination of petitioner's brief and argument we believe that all jurisdictional grounds raised by petitioner might be embraced in the above-quoted matter. We undertake hereinafter to show the nonexistence

of such grounds, but first we urge affirmative grounds which we believe will show lack of jurisdiction.

Lack of Jurisdiction.

(As claimed by respondent.)

If the questions of fact found and decided in the state court are adequate to determine the controversy and broad enough to maintain a valid judgment independent of any federal question, this Court is without jurisdiction, even though the state court may have also decided a federal question, and the writ will be denied or the judgment of the state court affirmed.

Capital National Bank of Lincoln v. First National Bank of Ohio, 172 U. S. 425;
Chouteau v. Maffit, 111 U. S. 200;
Kellogg v. King, 245 U. S. 627;
Southern Pacific Co. v. Schuyler, 227 U. S. 601;
Dibble v. Bellingham Bay Land Co., 163 U. S. 63;
Central Vermont R. Co. v. White, 238 U. S. 507.

The act of Congress of February 13, 1925, known as "An act to amend the judicial code and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes," conferred no additional jurisdiction on this Court; and such jurisdiction of the subject matter of the present case, if any exists, is by reason of the alleged contravention of a "right, privilege or immunity set up and claimed under a

statute of the United States," to wit, the "Federal Employers' Liability Act" of 1908.

True, petitioner does claim that the Missouri Court determined other grounds of negligence in disharmony with the rulings of this Court, to wit, the doctrine of last-clear chance, and duty to warn, and invokes jurisdiction on that ground; but do those matters involve a federal question? We think not. If there is a federal question here, it is assumption of risk.

The Federal Employers' Liability Act does not undertake to define negligence, except as to assumption of risk; so that, aside from this ground, negligence under the Federal Act is to be determined by the application of the principles of the common law. An examination of the cases in this court since the effective date of the Federal Act does not impress one with the thought that the announced principles under the common law, as regards actionable negligence, have been in any way altered or restricted (Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492).

In affirming the judgment nisi in the present case, the opinion of the Missouri Court, as is apparent on the face thereof (Rec., p. 278), was based on the negligent failure to warn, a nonfederal question, and a question of fact, and broad enough and adequate to determine the controversy and maintain the judgment independent of any federal question, even had there been such.

Nor can petitioner successfully maintain that any right, privilege or immunity was specially set up or claimed under any statute.

The record shows that instead of so setting up and claiming such right, title or immunity by offering and requesting the trial court to give a peremptory instruction on assumption of risk, and either having it sustained, or if it was refused standing on such refusal, that petitioner requested, **and the Court gave, without modification**, an instruction on this very subject. And these matters are apparent on the face of the opinion (Rec., p. 276) as well as by the record (Rec., p. 246).

If the questions of fact found and decided in the state court are adequate to determine the controversy and broad enough to maintain a judgment independent of any federal question, this Court is without jurisdiction, even if the state court may have also decided a federal question.

In Capital National Bank of Lincoln et al. v. First National Bank of Cadiz, Ohio, 172 U. S. 425, this Court, speaking through Mr. Chief Justice Fuller, said:

> "If the denial by the state court of a right under a statute of the United States is relied on as justifying our interposition, before it can be held that the state court thus disposed of a federal question, the record must show, either by the words used or by clear and necessary intendment therefrom, that the right was specifically claimed; or a definite issue as to the possession of the right must be dis-

tinctly deducible from the record, without an adverse decision of which the judgment could not have been rendered.

"Moreover, even though a federal question may have been raised and decided, yet if a question, not federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this Court will not review the judgment."

In discussing the necessity that the decision below involves a federal question, this Court, in **Chouteau v. Maffit, 111 U. S. 200**, said:

"From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

This rule has been announced in varying language many times, and **Chouteau v. Maffit**, supra, has been affirmed on this point in the comparatively recent case of **Kellogg v. King, 245 U. S. 627.**

In Southern Pacific Co. v. Schuyler, 227 U. S. 601, it is held (l. c. 610):

"Whether the relation of carrier and passenger arises in the case of one traveling gratuitously in violation of the antipass provision of the Hepburn

> Act, in the absence of any federal statute regulating the matter, is a question not of federal but of state law."

The judgment against the railway was affirmed, this Court (l. c. 610) holding:

> "It is settled by numerous decisions of this Court that where the decision in the state court adverse to the plaintiff in error proceeds upon two independent grounds, one of which not involving a federal question, is suffcient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed."

To like effect is Dibble v. Bellingham Bay Land Co., 163 U. S 63 (l. c. 69), and Central Vermont R. Co. v. White, 238 U. S. 507.

In view of all of which respondent believes that this Court ought not to assume jurisdiction herein.

Nonexistence of Jurisdictional Grounds Claimed by Petitioner.

A. The Missouri Supreme Court, instead of departing from the rulings of this Court, adhered strictly thereto. An examination of the opinion sought to be reviewed here shows that the reasoning throughout was with a clear perception of, and was based on, the present existing law as declared by this Court in Chesapeake & O. R. Co. v.

Proffitt, 241 U. S. 462 (Rec., p. 272); Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310 (Rec., p. 273), both under the Federal Employers' Liability Act.

As to Aerkfetz v. Humphreys, 145 U. S. 418, the opinion holds that the rule there announced (as in other cases cited by appellant) is not applicable because the action here is founded upon the Federal act (Rec., p. 272).

In this connection it may not be inappropriate to recall that the Aerkfetz case (supra) was decided in 1892, fourteen years prior to the enactment of the 1906 Federal act. Its utter inapplicability is, we believe, readily seen from its many points of dissimilarity as compared with the case at bar, as will be pointed out hereafter.

The other cases cited by appellant are not set out in the opinion. The motion to transfer to the court en banc (Rec., p. 280) cites federal cases claimed to have been departed from, but this motion to transfer refers to the modified opinion, and so, of course, was filed subsequently thereto, although the contrary appears from the record (Rec., pp. 265, 279).

B. As to the allegation here that the principles of law applied by the Missouri courts are alien to this jurisdiction, in respect to the duties of interstate carriers in yard operations as well as assumption of risk, we submit that the very converse is apparent from the opinion (as pointed out in the pages immediately preceding), as well as from evidence and authorities which will be referred to in detail by respondent later on in these pages.

As to Pryor v. Williams, 254 U. S. 43 (Williams v. Pryor, 272 Mo. 613), regardless of how far astray the Missouri court went in that case, the facts therein as compared to the case at bar are so utterly dissimilar as to be valueless as a criterion. Nor do we see how the doctrine of last clear chance could apply in the case of an employe falling backward by reason of the giving way of a defective claw bar—as occurred in that case.

Since petitioner's brief devotes considerable space to the Pryor v. Williams case, supra (20, 22, 23), without setting out the facts determinative of the rule announced by this Court, it may not be amiss to supply the omission:

"Pryor v. Williams, 254 U. S. 43.

"Action for personal injuries based on Employers' Liability Act. Negligence is charged against petitioners as respondents of the Wabash R. R. Co.

"Respondent Williams, plaintiff * * * was engaged in tearing down a bridge on the line of the railroad, and a defect in a claw bar which he was directed to use caused the bar to slip while he was attempting to draw a bolt; in consequence, he lost his balance and fell to the ground. * * * The defect, it is alleged, Williams did not know. Negligence, however, was charged against him, and assumption of risk and contributory negligence. He recovered a verdict. * * *

"He was ordered by the foreman in charge of the work to use a claw bar which was defective, in that the claws 'had become so rounded and tooled by long usage that they could not be made to grip the shank

securely, and slipped from their hold when plaintiff pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground.' The plaintiff stated that to discover the defect required an inspection of the under side of the tool, and that in obeying the order of the foreman he did not pause to make such inspection, but used the tool without any but casual inspection of its top surface, which did not reveal the defect.

"The railroad was engaged in interstate commerce, and the cause of action under the case as made fell within the purview of the Federal Employers' Liability Act. * * * The Court (Missouri Supreme) held that Williams' assumption of the risk did not have the consequence assigned to it by the Kansas City Court of Appeals (which reversed the judgment nisi in favor of plaintiff), but, if it existed, amounted in legal effect only to contributory negligence, and that such negligence under the federal statute worked a reduction of damages and not a defeat of the action, and, applying these elements of decision, adjudged that the 'case was well tried by the court nisi and its judgment should be affirmed.' * * * The Court was requested to instruct the jury that the effect of assumption of risk by Williams incident to the use of the claw bar, and the circumstances under which it was used, was to relieve defendants from liability 'for the injury resulting therefrom.' The Court refused the instruction as requested and amended it by adding throughout 'and such fact (the assumption of risk) will be considered by you in determining the amount of plaintiff's recovery, if any, under all of the instructions.'

"The refusal and modification were assigned as error, and the Supreme Court considered and decided, as we have seen, that the fact was of no determining importance, and, if it existed, only constituted contributory negligence and could operate only in reduction of the amount of recovery, not defeat recovery. This was error, as we have seen. Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion."

C. As to assumption of risk by reason of yard construction being a matter of law: As stated in the opinion (Rec., p. 278), plaintiff's instruction predicated his right to recover on the failure to warn, and not on the proximity of the tracks. But, aside from that fact, petitioner, by requesting an instruction on that very subject (which instruction the trial court gave without modification [Rec., p. 276]), accepted the issue. The jury found against it. However, the cases cited on page 17 of petitioner's brief, paragraph V, on this subject we believe fall far short of sustaining the position now taken by petitioner. This we will endeavor to demonstrate in its proper place.

STATEMENT OF THE CASE BY RESPONDENT TO CORRECT INACCURACIES AND OMISSIONS IN PETITIONER'S STATEMENT.

Plaintiff nisi, respondent here (and so designated hereafter), in an action under the Federal Employers' Liability Act, was struck by cars and run over on October 27, 1922 (Rec., p. 266). while checking cars in the employ of the then Receiver for the petitioner, Toledo, St. Louis & Western Railroad Company, in its yards at Madison, Illinois, and seriously injured (Rec., p. 268). There was a verdict and judgment on December 7, 1923 (Rec., p. 1). In petitioner's statement of the case (p. 2) it is recited that in the Missouri Supreme Court there were two opinions, "one in response to a petition for rehearing," although there is nothing in the record to indicate that the later one (Rec., pp. 266, 279) was in response to such petition. However, petitioner has seen fit to set it out (Rec., pp. 256 to 265). It should not be confused with the final one (Rec., pp. 266 to 278), review of which is sought here.

Other matters of pleadings and evidence sufficient for a full understanding of the case appear in the opinion (Rec., pp. 266 to 271).

(Correction of Inaccuracy in Petitioner's Statement, Page 7, Par. 2.)

Respondent contends that the manner in which the cars were handled was **not** the usual and customary method.

Respondent testified that it was customary in that yard to ring the bell when engines are moved (Rec., p. 94); that when he was checking the switchmen passed and told him if they were going to kick cars down where he was working, close to where he was working (Rec., pp. 94, 95). And this was corroborated by respondent's son, an employe in the yard (Rec., pp. 113, 114, 117). There was testimony by the engineer that if he had "seen this man working down there between those tracks, before starting the engine," he would have rung the bell (Rec., p. 215); and again, if he had "seen him there **under the conditions as they were,**" he would have rung the bell (Rec., p. 215). True, he attempts to qualify this last answer by adding the words, "If I knew the man was in the way"; but in the very next breath he admits in no uncertain language that seeing the man was 100 yards ahead and knowing he was going to shunt cars down that way, seeing his lantern, he would not have been able to tell what tracks respondent was between (Rec., p. 215); that **if he had seen a man down there at that distance he would not have known whether he was between the rails or between the tracks, or what track those cars were going down** (Rec., p. 216). Obviously, respondent **was** in danger. The engineer's testimony likewise was that if he sees anyone in danger he rings the bell and blows the whistle (Rec., p. 214).

(Correction of Inaccuracy in Petitioner's Statement, Page 8, Par. 6.)

At the time respondent was struck by the shunted cars he was facing a car on track 5, checking it (Rec., p. 90). He had a little more than half the time usually allowed him to check these trains (Rec., p. 95). He was intent on his work and had no opportunity to keep himself informed as to the movements of the switching crew. He had to get the train out at a certain time (Rec., p. 95).

(Correction of Inaccuracy in Petitioner's Statement, Page 8, Par. 7.)

Murdock's knowledge of respondent's position at the time he shunted the cars past him is amply supported by the record (Rec., pp. 34, 36, 42, 52, 64, 65).

An employe engaged in **checking** cars has such insufficient room between the tracks that to do so without risk he must depend on warning and then flatten himself against the cars being checked (Rec., p. 96).

Respondent checking cars on track 5 was in danger if cars were moved past him without his knowledge, **and Murdock must have known it** from the physical conditions as disclosed by his own testimony, and from his knowledge of the manner in which checkers work (Rec., pp. 37, 38, 40,

43, 56). George Allen, a member of the switching crew, "knew respondent was in a close place" (Rec., p. 118). The engineer testified that if he had seen a man down there at that distance he could not tell whether he was between the rails or between the tracks (Rec., p. 216), and that if he had seen this man working down there between those tracks he would have rung the bell before starting the engine.

(Correction of Inaccuracy in Petitioner's Statement, Page 10, "The Charge.")

Petitioner's **resume** of respondent's instruction No. 2 makes it appear that the jury, upon finding **any one** of the various grounds of negligence, could find in favor of respondent.

As a matter of fact, the several alleged negligent acts and omissions were submitted in the conjunctive, the jury being required to find the existence of each and all of them before convicting the petitioner of negligence (Rec., pp. 241, 244).

As to the refusal to withdraw the charge of negligence as to proximity of tracks, the petitioner, as heretofore pointed out, requested and the Court, without modification, gave instruction No. 5 (Rec., p. 246).

SUMMARY OF ARGUMENT FOR RESPONDENT.

I.

It is negligent to move cars in an unlighted railroad yard without bell or other warning when such movement is likely to subject employe working therein to danger.

Texas and Pacific Railway Co. v. Gentry, 163 U. S. 353;
Frazier v. Interstate Railroad Co., 264 Fed. 96;
Chesapeake & Ohio R. Co. v. Proffitt, 241 U. S. 462;
Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114;
Davis, Director Gen., v. Hynde, 4 Fed. (2d) 656;
St. L. & S. W. Ry. Co. v. Martin, 266 U. S. 623 (certiorari denied No. 579), 165 Ark. 30.

II.

While employe assumes risks ordinarily incident to the business, he does not assume an unusual risk occasioned by the master's negligence unless he becomes aware of and appreciates it.

Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376;
Kanawha & M. Ry. Co. v. Kerse, Admr., 239 U. S. 576;
Texas & P. R. Co. v. Harvey, 228 U. S. 319;
Davis v. Crane, 12 Fed. (2nd) 355;
Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64;

Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462;
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310;
C. R. I. & P. Ry. Co. v. Lester Brock, 266 U. S. 634 (certiorari denied No. 782), 305 Mo. 502.

III.

Even if custom and rules permit, such movement under such circumstances is negligent.

Norfolk & Western Ry. v. Earnest, 229 U. S. 114;
Texas & Pac. Ry. Co. v. Behymer, 189 U. S. 468;
C. R. I. & P. R. Co. v. Wright, 239 U. S. 548;
Boos v. Minn., St. P. etc. R. Co., 127 Minn. 381;
Chesapeake & O. Ry. Co. v. Proffitt, 241 U. S. 462.

IV.

Instructions given correctly state the law of the case.

Norfolk & Western R. Co. v. Earnest, 229 U. S. 114;
Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551;
City & Suburban Ry. v. Svedborg, 194 U. S. 201;
C. R. I. & P. R. Co. v. Ward, 252 U. S. 18;
Fidelity & Deposit Co. v. Courtney, 186 U. S. 342;
Kanawha & Michigan Ry. Co. v. Kerse, Admr., 239 U. S. 576;
Chesapeake & O. Ry. Co. v. Proffitt, 241 U. S. 462;
Texas & Pac. Ry. Co. v. Behymer, 189 U. S. 468;
C. R. I. & P. R. Co. v. Wright, 239 U. S. 548;
Boos v. Soo Line, 127 Minn. 381.

ARGUMENT FOR RESPONDENT.

The space where Allen was working between tracks 4 and 5 from rail of one track to rail of the other is 7 feet 1½ inches between the gauge lines (Rec., p. 85) and deducting 4 inches for the width of the two rails (Rec., p. 86) reduces the space to 6 feet 9½ inches. All cars, according to Murdock, overhang the rails 18 to 24 inches (Rec., p. 40). But the identical cars complained of (Rec., p. 39), both exactly the same kind of car (Rec., p. 40) and the same type of car as shown (Rec., p. 57) in the last of the five photographs following record page 154, by actual measurement were found to be 10 feet wide (Rec., p. 112).

The width of these tracks (standard gauge) is 4 feet 8 inches (Rec., p. 43). The 5 feet 4 inches difference between the car width and track width necessarily caused an overhang of 2 feet 8 inches. Increasing that by 4¼ inches, the distance the grab iron protrudes, 3 feet and ¼ inch came off the 6 feet 9½ inches, **restricting the working space to 3 feet 9¼ inches**, so that when we figure the standing cars being checked on track five overhang the rail at least 18 inches (Rec., p. 40), the space in which respondent had to work had become a scant 2 feet 3¼ inches.

It was necessary to face the car being checked (Rec., p. 90) and stand back from it about 3 feet, or about 5 feet from the rail (Rec., p. 91), and—the rail to rail space being 7 feet 1½ inches (Rec., p. 85)—within 2 feet 1½

inches of the rail of track 4 (the track on which the cinder cars were shunted past) and with his back to track 4.

To avoid being struck by passing cars on adjoining track, he depended on the engine bell or other warning (Rec., pp. 94, 95) and would flatten himself against the cars he was checking until the others passed (Rec., p. 96). The engineer testified that had he seen respondent he would have rung the bell (Rec., p. 215); that at that distance it was impossible to tell what tracks he was between (Rec., pp. 215, 216) or whether he was between the tracks or between the rails (Rec., p. 216). George Allen said he knew respondent was in a close place (Rec., p. 118). Cars when shunted, as these were, do not make much noise (Rec., p. 44). Respondent's duties required careful attention. He had only about half the usual time to check these cars (Rec., p. 95). The accident occurred about 1:15 o'clock a. m. (Rec., p. 42). There was no light in the yards (Rec., p. 134). It was a starlight night, no moon shining (Rec., p. 134).

Aside from the academic proposition of knowledge by a railroad of conditions in its own yard and its own equipment, Murdock's testimony shows him to have been a car checker himself for about seven years (Rec., p. 36); that he knew the way car checkers work (Rec., p. 37), and the overhang of cars (Rec., p. 40) and yet knowing all these conditions and seeing respondent with a lantern (Rec., pp. 34, 36) he ordered the car movement down track 4 (Rec., p. 32) without warning of any kind (Rec., pp.

44, 46). Whether or not it was customary to give warning is a matter of serious controversy. But even had the custom of no warning been established, to contend that such custom justified the act under the circumstances amounts to just this: "Even though you are in danger and might, if given timely warning, extricate yourself, our custom here is not to warn, and be the result as it may, that custom goes."

I.

It is negligent to move cars in an unlighted railroad yard without bell or other warning when such movement is likely to subject employe working thereon to danger.

In Texas and Pacific Ry. Co. v. Gentry, 163 U. S. 353, this Court affirmed a judgment for plaintiffs, surviving relatives of an engineer, whose death resulted from negligence of railroad in their yards, at night. He was "run down" and killed by a flat car coupled in front of a locomotive used for switching purposes without "headlight, lantern or lights of any kind, or any other signal of danger, or any person to watch for employes on said flat car to give warning of its character, or to sound a whistle or to ring the bell of the locomotive." • • •

The defendant requested a directed verdict on the ground that no negligence was shown.

This Court (l. c. 365) held that these matters were all jury questions.

In Frazier v. Interstate R. Co., 264 Fed. 96, the Circuit Court of Appeals, in reversing judgment sustaining a demurrer in favor of the railroad, said (l. c. 97):

"* * * Aerkfetz v. Humphreys, 145 U. S. 418, is mainly relied on to sustain the demurrer. In that case it was held that negligence could not be inferred from the failure of the defendant to keep a lookout or sound the bell or whistle. * * * It was daylight and there was no obstruction to his view of the slowly approaching train."

* * * * * * *

"The case alleged here is essentially different, some of its features being in striking contrast with these which distinguish the Aerkfetz case."

* * * * * * *

"In the darkness of the night he had to step down from the engine, couple it to a car, step from between the engine and car and communicate by signal with an extra brakeman, who was to couple another car, that the train was ready to pull out. After he had coupled, and while standing near the main track waiting for the exchange of signals, a train, consisting of an engine and a freight car in front and one behind, **came upon him unawares, without warning, and killed him.** The crew of this engine and cars knew the position and work of deceased and his crew, and the danger to which they were exposed, or in the exercise of due care should have known."

* * * * * * *

"Both authority and reason are against the proposition that the crew of a switch train, or any other

> **train, can be judicially declared, as a matter of law, to be without fault in running along** an adjacent track under such conditions as here appear **without showing a light** or sounding a bell or whistle or having a lookout. Upon proof of the allegations of the declaration it will be for the jury to say whether the proximate cause of the casualty was solely negligence of the defendant or of the plaintiff, or the two combined, or inevitable accident. Among the cases sustaining this conclusion are cited: Norfolk & Western Ry. v. Ernest, 229 U. S. 114; Chicago, Rock Island Ry. v. Wright, 239 U. S. 548; Erie R. R. Co. v. Purucker, 244 U. S. 320; Toledo, St. L. & W. R. Co. et al. v. Bartley, 172 Fed. 82; Southern Ry. Co. v. Smith, 205 Fed. 360; Southern Ry. Co. v. Darnell's Adm'x, 114 Va. 312; Hardwick v. Wabash R. Co., 181 Mo. App. 156.
>
> Reversed."

In Chesapeake & Ohio R. Co. v. Proffitt, 241 U. S. 462, in which judgment against the railroad was affirmed, a brakeman was coupling cars in railroad yard, at night. While so engaged the yard crew drove a cut of cars into the standing cars, causing plaintiff to be injured. There was evidence (l. c. 464) that it was customary to take out cars and put others in, and perform such shifting operations at both ends of the train. Whether plaintiff knew of the custom was, under the evidence, open to dispute. This court said (l. c. 468):

> "Negligence in the doing of the work was the gravamen of the plaintiff's complaint, in his declaration as in his evidence, and defendant was not entitled to an-

instruction making the pursuit of a customary system decisive of the issue, without regard to whether due care was exercised in doing the work itself."

Norfolk & Western Ry. Co. v. Ernest, 229 U. S. 114, was an action under the Federal Act for injury in railroad's yards, at night, while walking ahead with a torch, piloting a locomotive through switches to a main track. One of the alleged justifications for negligence urged by the defendant was that the engineer had the right to act on the assumption that plaintiff would take reasonable precaution for his own safety against the approaching engine. It was likewise contended that the usual custom relieved the engineer of the duty to keep a lookout. In this situation the highest court held that all questions were for the jury. The standard of ordinary care was applied. Judgment for plaintiff in the court below was affirmed.

In Davis, Director etc. v. Hynde, 4 Fed. (2nd) 656, l. c. 657:

"It is said that, inasmuch as this case admittedly arises under the Federal Employers' Liability Act (Comp. St., Sec. 8660), the defense of assumption of risk is available (Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492) * * * and the burden of proof is upon plaintiff (N. O. etc. Ry. Co. v. Harris, 247 U. S. 367). * * * However, there was evidence sufficient, if believed, to show that defendant was guilty of gross negligence in running its switch engine with a cut of cars at an excessive rate of speed through

a dense cloud of steam escaping from an engine on the track by the side of the one on which the switch engine was traveling without lights or warning, with full knowledge that the deceased and other employes were working in that particular vicinity. While it is true that deceased may have been guilty of contributory negligence, and the lower court so found as a matter of law, in stepping upon the track which was just a few feet from where he was working, nevertheless, he assumed only the ordinary risks incident to the nature of his employment and of which he had knowledge. He was not bound to anticipate acts of gross negligence, such as some of the evidence in the case indicated (Chesapeake & Ohio R. R. Co. v. De Atley, 241 U. S. 310; Chesapeake & Ohio R. R. Co. v. Proffitt, 241 U. S. 462; Y. & M. V. Ry. Co. v. Wright, 235 U. S. 376; Texas & Pacific Ry. Co. v. Swearingen, 196 U. S. 57; Texas & Pacific Ry. Co. v. Archibald, 170 U. S. 665; C. N. O. & T. P. Ry. Co. v. Thompson, 266 Fed. 149 C. C. A. 211)." * * *

(l. c. 658) The accident occurred on December 24, 1919, at about 6 p. m., which was after dark. * * *

The judgment for plaintiff below was affirmed.

In St. Louis Southwestern Ry. Co. v. Martin, 266 U. S. 623, in which writ of certiorari was denied (No. 579), the facts as reported in 165 Ark. 30, show this to be an action under the Federal Act for death of railroad yard clerk crushed between cars in railroad yards at Pine Bluff.

While crossing one of twelve tracks between the yard office and scales he was passing between the end of a

single car and four others when a kicked car collided with the four cars, catching him in between. It was dark and Martin had a lantern on his arm. The kicked car was rolling down the track at a rapid speed with no one on it to control its movements (l. c. 33, 34). Judgment for Martin, plaintiff nisi, was affirmed by the Arkansas Court, and, as stated above, this Court denied writ of certiorari.

The foregoing are neither isolated or extreme cases; they are but typical of the rule as enumerated time and again by this as well as other courts, federal and state, on the doctrine of actionable negligence in railroad yards.

II.

While employe assumes risks ordinarily incident to the business, he does not assume an unusual risk occasioned by the master's negligence unless he becomes aware of and appreciates it.

The shunting of the cinder cars under the circumstances constituting an unusual and extraordinary risk, respondent did not, as a matter of law, assume it, it being apparent that he was unaware of such car movement.

In Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, judgment for death of employe, in action under the Federal Act, was affirmed. Assumption of risk was pleaded, and it was likewise contended by plaintiff in error (railroad) that "plaintiff's case cannot be saved by claiming that it was a matter of contributory negligence and not

assumption of risk, all of which appears in brief of plaintiff in error" (l. c. 377-8). It was the case of an engineer killed when engine being operated by him collided with cars projecting from spur track so near main line as not to allow sufficient clearance. This Court in affirming the judgment below held that there was no assumption of risk in the case, but that it did call for contributory negligence of a fellow servant.

Kanawha & M. Ry. Co. v. Kerse, Admr., 239 U. S. 576, was an action under the federal statute, in which a judgment for the death of a brakeman was affirmed by this Court. Decedent, a brakeman riding the top of a car, came in contact with a timber fastened horizontally across a switch track at a height insufficient to clear him. There was strong testimony to charge decedent with knowledge of the obstruction (l. c. 580). This Court held (l. c. 581):

> "The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses, and free from contradiction, the trial court could not be charged with error in refusing to take the question from the jury."

Texas & P. R. Co. v. Harvey, 228 U. S. 319, was an action for death of a hostler's helper, his death resulting from coming in contact with one of a number of posts supporting roundhouse roof while seated in cab window of

locomotive, his hips protruding over the sill. Judgment for his death was affirmed by this Court.

Davis v. Crane, 12 Fed. (2nd) 355, was an action under the Federal Act for death of a brakeman on top of a moving train, in the yards at St. Louis, his head colliding with overhead bridge. The case was twice tried in the District Court, the first trial resulting in a directed verdict for the railway. This judgment was reversed by the Circuit Court of Appeals, and the District Court directed to grant a new trial (291 Fed. 551) on the ground that the negligence of the railway and contributory negligence of decedent were jury questions. The second trial under these directions resulted in a verdict and judgment against railway (l. c. 356), and on this appeal the judgment for plaintiffs was affirmed.

Assumption of risk was pleaded and urged on appeal. The Appellate Court held that to be a jury question, citing in support thereof numerous decisions of this Court and of the United tSates Circuit Court of Appeals (l. c. 356-7).

The opinion (l. c. 358) by Judge Kenyon goes to considerable pains to explain just what does constitute such appreciation of danger as to assumption of risk of defects attributable to the master.

The opinion continues (l. c. 359) in this language:

> "We are asked to say, as a matter of law, that under these circumstances, where the brakeman in

> the line of his duty was on top of a car near the engine of a long moving train, watching for signals from the rear, with his mind necessarily concentrated on that duty, with his back to the bridge the train was approaching, the danger therefrom by reason of insufficient clearance and absence of tell-tale warnings was so obvious that he must be held to have assumed the risk. We cannot so hold."

In Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, this Court affirmed a judgment for plaintiff's intestate, a brakeman killed from coming in contact with waterspout which cleared the car on which decedent was riding less than a man's height, and (l. c. 68) approved an instruction on assumption of risk to practically the same effect as the instruction in the instant case.

In Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462, an action under the federal statute, a brakeman, injured coupling cars, recovered substantial damages (l. c. 465). The judgment in the District Court was affirmed by the Circuit Court of Appeals and affirmed by this Court, which stated (l. c. 467):

> "It appears to have been conceded by plaintiff in the Circuit Court of Appeals that the attaching and detaching of cars by working on both ends of the train at the same time was customary at the Gladstone yard, but it does not appear to have been conceded * * * that plaintiff knew of this custom, or had such opportunity for knowledge to be charged with notice of it."

In Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, the opinion (l. c. 314) states:

> "On the facts of the case before us, therefore, plaintiff having voluntarily entered into an employment that required him, on proper occasions, to board a moving train, he assumed the risk of injury normally incident to that operation, other than such as might arise from the failure of the locomotive engineer to operate the train with due care to maintain a moderate rate of speed in order to enable plaintiff to board it without undue peril to himself. **But plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, until made aware of the danger, unless the speed and consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other.**"

In C. R. I. & P. Ry. Co. v. Lester Brock, 266 U. S. 634, certiorari was denied (No. 782). The opinion on which the railroad based its petition for writ was by the Missouri Court and appears in 305 Mo. 502. Action was under the Federal act, and resulted in a judgment against the railroad, affirmed by the Missouri court of last resort in banc upon remittitur of part of the amount awarded. Plaintiff, nisi, while standing on one of three parallel tracks facing northwest watching and waiting for the

passing of an eastbound freight, was struck by a motor car which approached from his rear, and operated by the railway. The Court refused to give a peremptory instruction to the effect that the railway was under no duty to look out for linemen, including plaintiff, upon its tracks. This instruction was requested on the theory that there was no evidence that plaintiff was actually seen in time to stop the motor car, and that plaintiff knew the conditions and assumed the risk of being struck and injured. It was also contended that plaintiff assumed the risks (known to him) of the use of the bunk car (from which he had alighted) and of the accustomed daily movements of the motor car.

The opinion holds (l. c. 698):

> "The testimony tended to show that the running of the motor car * * * was unusual and not expected, * * * it must be said that he would assume the risks ordinarily incident thereto, and if the place was made unsafe by the negligence of the defendant in a respect of which the plaintiff had full knowledge, and he continued to use them thereafter, he would be held to have assumed the added risk also, but he would not be held to have assumed the added risk, the result of an unusual and unexpected act of negligence on the part of the defendant of which he had no knowledge. This is in accord with what was said in Pope v. Terminal R. R. Ass'n (Mo. Sup.), 254 S. W., l. c. 46, and following Seaboard Air Line v. Horton, 233 U. S. 504; C. & O. v. De Atley, 241 U. S. 310; C. & O. v. Proffitt, 241 U. S. 462; Yazoo & Miss.

R. R. Co. v. Wright, 235 U. S. 376; Erie R. R. Co. v. Purucker, 244 U. S. 320. * * * The Court could not say as a matter of law that plaintiff assumed the risk under the evidence." * * *

Respondent believes the foregoing cases are fairly representative of the rulings of this Court as to assumption of risk, as applicable to the facts in the case at bar, and that a comparison will show perfect harmony between the opinion under review and the rulings of this Court as exemplified above.

III.

Even if custom and rules permit, such movement under such circumstances is negligent.

Norfolk & Western Ry. v. Earnest, 229 U. S. 114. This is an action under the federal act, for injury to a locomotive fireman acting as pilot for a switch engine, in a switch yard in the nighttime. Plaintiff, nisi, had a judgment. On error to the Circuit Court, this Court affirmed the judgment. Defendant relied upon a custom and practice as an excuse for its conduct on the assumption that all responsibility rested upon the plaintiff to take reasonable precaution for his own safety. The Court in this case adopts the doctrine of ordinary care as the controlling standard for the engineer as regards his duty to keep a lookout on the track for plaintiff, who was

in a place where his presence was usual and could reasonably have been anticipated

Plaintiff admitted that as he advanced from the first to the second switch, a distance of 130 feet, he made no attempt to see where the engine was, and "the engineer substantially admitted that in covering that distance he made no attempt to see where the plaintiff was" (l. c. 117). This Court said (l. c. 118):

> "The defendant complains that the Court refused to say to the jury in that connection that the engineer was not required to keep any lookout for plaintiff. We think the refusal was right. As before indicated, there was evidence tending to show that it was usual for the pilot to walk between the rails in advance of the locomotive, that the conditions outside the track made it necessary to do so in the nighttime, and that all this was known to the engineer. Whether this evidence was true was for the jury to determine, and if it was true it certainly could not be said as a matter of law that the engineer was in the exercise of ordinary care, which was the controlling standard for him * * *."

In Texas and Pac. Ry. Co. v. Behymer, 189 U. S. 468, the defendant relied upon the ordinary method of handling a train as a basis for a finding that it was not negligent, apropos of which this Court (l. c. 470) said:

> "The fundamental error alleged in the exceptions to the charge is that the Court declined to rule that

the chance of such an accident as happened was one of the risks that the plaintiff assumed, or that the question whether the defendant was liable for it depended on whether the freight train was handled in the usual and **ordinary way.** Instead of that, the Court left it to the jury to say whether the train was handled with ordinary care; that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. **What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not"** (Wabash R. Co. v. McDaniels, 107 U. S. 454).

In C. R. I. & P. R. Co. v. Wright, 239 U. S. 548, the defendant relied upon its rules permitting a switching crew to run their engine through its yards with right of way over certain other trains. It collided with another such train. The highest court affirmed a finding of negligence and sustained the contention of the plaintiff in the court below to the effect that if the rules of the defendant permitted the doing of a thing that was negligent, to that extent the rules could be found unreasonable.

In Boos v. Minn., St. P. etc. R. Co., 127 Minn. 381, the Minnesota Court, on the same subject, has this to say:

"Nor could defendant toll its duty to use reasonable care in keeping safe the place where deceased was required to work, by invoking a custom or usage

of handling its cars in such an inherently dangerous manner as that disclosed by this record. As said in Hamilton v. Chicago, B. & Q. Ry. Co., 145 Iowa 431, 436, 124 N. W. 363, 365: **'It is practically the universal rule that custom or usage will not satisfy a negligent act.'** To the same effect see Braaflat v. Minneapolis & Northern Ele. Co., 90 Minn. 367, 369, 96 N. W. 920; Witia v. Interstate Iron Co., 103 Minn. 303, 309, 115 N. W. 169, 16 L. R. A. (n. s.) 128; The P. P. Miller, 180 Fed. 288; Thompson, Negligence, Par. 30, 3777; White's Supp. Id. (Vol. VIII), same sections. And, as declared by Mr. Thompson in his Commentaries on Negligence, Par. 4528, note: 'It would be difficult to state a proposition more careless of justice and absolutely brutal, than the proposition that a railroad company can shunt its cars along its tracks at night with no light upon them to apprise its yardmen of their approach, and with no man upon them to give warning to those who may be on the track in front of them.' See sections 4512-4543, Vol. VIII (White's Supp.) of the same work. See, also, Bordeaux v. Atlantic, 150 N. C. 528, 64 S. E. 439. Defendant could not have contracted for immunity from liability for negligence, and so much the more can it not be permitted to stand behind a negligent custom. Nor would an employe readily be charged with assuming the risks involved in such a custom, and the evidence in this case falls short of establishing any such assumption as a matter of law."

It is to be observed that the conclusions of the Minnesota Court are fortified by abundant and respectable authorities.

Again, referring to the case of Chesapeake & O. Ry. Co. v. Proffitt, 241 U. S. 462. It was claimed that the work of switching at both ends of a manifest train was in accordance with a general custom and practice known to plaintiff. As to that proposition this Court said:

> "In the absence of such knowledge or notice, the custom could not be made binding upon plaintiff; certainly not without a finding that it was one that a reasonably careful employer would have adopted."

IV.

A. Instructions given correctly state the law of the case.

B. If there was error in respondent's instruction, it was not prejudicial to petitioner in view of testimony of switch foreman that he saw and knew of respondent's presence when he directed the negligent act complained of.

C. There was no error in refusal of petitioner's requested instruction "K" on custom in its yards as to warning, said instruction not properly declaring the law.

The instruction (No. 2) asked and given at the instance of plaintiff (Rec., pp. 241-2-3-4) amounted in substance to this:

It required the jury to find a combination of elements, including physical surroundings and method of work, which would tend to show that respondent's position was one of peril. If they found all these things and that by reason thereof the respondent **was** in a position of peril

and oblivious thereof; and if they further found that the men in charge of the cinder car movement knew all these things and could have warned respondent in time for him to have extricated himself, but failed to do so and respondent was injured by reason of such failure to warn, then and only then could they find a verdict in his favor, always providing that he was in the exercise of ordinary care and was not injured as the result of any risks assumed. It is true, as petitioner contends, instead of requiring the men responsible for the car movement to actually see respondent—that part of the instruction had appended the words "or by the exercise of ordinary care could have seen him." But inasmuch as there is no controversy about the fact that Murdock actually did see respondent, and so testified repeatedly (Rec., pp. 34, 36) the error, if error there was, could not have been prejudicial to petitioner. The opinion of the Missouri Supreme Court (Rec., p. 277) states: "The evidence shows, without any controversy, that Murdock, the switch foreman, saw and knew of the plaintiff's perilous position. * * *"

Apparently petitioner takes no exception to the phraseology of the instruction given at the instance of respondent on assumption of risk, but contends that the Court should not have let the jury pass on this matter and should have held the respondent to have assumed the risk as a matter of law. We do not agree to this, nor do we believe that under the applicable rulings of this Court there is any precedent therefor. However, the peti-

tioner, at the trial nisi, asked and the Court gave without modification an instruction on assumption of risk (Rec., p. 246), and thus waived whatever, if any, merit there was in their contention.

A.

In Norfolk & Western R. Co. v. Earnest, 229 U. S. 114, under somewhat similar circumstances this Court (l. c. 118) approved the following instruction:

> "If the jury believe from the evidence that it was necessary or usual within the knowledge of John Drawbond (the engineer) for plaintiff to walk on, along or over the tracks of the defendant company in front of the said engine while it was moving, in order to properly perform his duties of piloting said engine out of said yard, it was then the duty of the defendant company * * * to use reasonable care and caution in the management of said engine and to keep such a lookout for the plaintiff as an ordinarily prudent and careful man would have done under the circumstances, to avoid running said engine upon or over the plaintiff; and if the engineer did not exercise such reasonable care and caution and that his failure so to do was the proximate cause of the accident, then they must find for the plaintiff."

Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, is a case where a wharf owner recovered judgment for injuries caused by defendant operators of a steamboat,

for negligent handling, crushing plaintiff's foot between the boat and wharf. This Court in affirming the judgment nisi approved, among others, an instruction (l. c. 558):

> "* * * the contributory negligence on his (plaintiff's) part would not exonerate the defendant and disentitled the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

In substance, this instruction is the same as the last-clear-chance instruction in the case at bar.

B.

City & Suburban Ry. v. Svedborg, 194 U. S. 201: Error was assigned in an instruction that told the jury they could find for plaintiff if the starting of the car from which she was alighting was due to the negligence of the motorman or conductor, or both, when it was claimed that there was not the slightest proof of negligence on the part of the conductor. This Court said (l. c. 203):

> "We need not review the evidence as to the conductor; for if, as the defendant insists, there was no evidence whatever showing negligence on the part of the conductor, then the modification made by the Court (adding the words 'or conductor, or both') could not have misled the jury as to prejudice the defendant."

To like effect are C. R. I. & P. R. Co. v. Ward, 252 U. S. 18, and Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, l. c. 351.

In Kanawha & Michigan Ry. Co. v. Kerse, Admr., 239 U. S. 576, this Court said (l. c. 582):

> "* * * The refusal of this request appears plainly erroneous. But this does not result in a reversal of the judgment * * * because, by specific findings of fact, the jury negatived the hypothesis upon which alone the instruction was based. * * * A judgment is not to be reversed for an error by which the plaintiff in error cannot have been prejudiced. * * *"

C.

In Chesapeake & O. Ry. Co. v. Proffitt, 241 U. S. 462, it was held (l. c. 468) that

> "defendant was not entitled to an instruction making the pursuit of a customary system decisive of the issue, without regard to whether due care was exercised in doing the work itself. Even if plaintiff knew and assumed the risks of an inherently dangerous method of doing the work, he did not assume the increased risk attributable, not to the method, but to negligence in pursuing it. * * *"

Petitioner's instruction K on assumption by respondent of risk of custom not to warn is equally as vulnerable as the one referred to above.

Similar rulings are contained in Texas & Pac. Ry. Co. v. Behymer, C. R. I. & P. R. Co. v. Wright, and Boas v. Soo Line, supra, under respondent's third assignment.

CASES CITED BY PETITIONER—THEIR INAPPLICABILITY.

The only cases cited by petitioner touching the merits of the case appear in its "Specifications of Error" and "Brief" (pages 13 to 18, inclusive).

These cases are here set out in the order under the same headings as in petitioner's brief. The numbering in the left margin will identify them with corresponding numbers in the pages immediately following, and in which we endeavor to show their dissimilarity to the instant case and wherein they do not apply.

V.

The plaintiff assumes whatever risks were involved in the manner in which the yards were constructed and the usual train movements therein.

(1) Boldt v. Pennsylvania R. R. Co., 245 U. S. 445;
(2) Chesapeake etc. Ry. Co. v. Nixon, 271 U. S. 219;
(3) Tuttle v. Milwaukee Rwy., 122 U. S. 189;
(4) Randall v. Baltimore etc. Railway Co., 109 U. S. 478;
(5) Connelley v. Pennsylvania R. Co., 201 Fed. 54, approved in Railway Co. v. Nixon, 271 U. S. 219.

VI.

In switching operations the lack of signals is not negligence.

(6) Aerkfetz v. Humphreys, 145 U. S. 420;
(2) Chesapeake etc. Ry. Co. v. Nixon, 271 U. S. 219;
(7) Reading Co. v. Haldeman, 20 F. (2d) 53 (C. C. A. 3rd).

VII.

Those in charge of the train movement could not be required to take special efforts to avoid injury to the plaintiff unless his peril was known to them.

(8) St. Louis etc. Ry. Co. v. Shumacher, 152 U. S. 77;
(9) Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551;
(6) Aerkfetz v. Humphreys, 145 U. S. 420.

VIII.

An experienced railroad employe who is familiar with the custom of switching cars without providing them with a lookout or lights assumes the risk of injury resulting from such custom and is precluded from recovering for injuries suffered by reason thereof under the Federal Employers' Liability Act.

(10) Southern Pacific Co. v. Berkshire, 254 U. S. 415;

(11) Seaboard Air Line Ry. v. Horton, 233 U. S. 492;
(12) Jacobs v. Southern R. R., 241 U. S. 229;
(13) Gilmer v. Yazoo & M. V. R. Co., 4 Fed. (2nd) 963 (certiorari denied, 268 U. S. 639) (705).

(1) Boldt v. Pennsylvania R. R. Co., 245 U. S. 443, involved negligence in respect to a car kicked in a railroad yard against standing cars while plaintiff, an experienced yard conductor, was between, contrary to instructions, attempting to adjust a faulty coupler. The case was tried to a jury. An instruction on assumption of risk was given. The jury found for the defendant railroad.

As the opinion in this court recites, "a rule forbade employes from going between the cars without taking precautions" not observed in the present case. The place of the injury was, according to the definition in the instruction, "a live track, a dangerous place to work." As he was between the cars and could not have been seen by the men who "kicked" the cars, neither "failure to warn" or the doctrine of last-clear chance were in the case.

As to assumption of risk of either yard construction or the usual train movements, the former element was nowhere in the case, and the latter was left to the jury.

(2) Chesapeake etc. Ry. Co. v. Nixon, 271 U. S. 219. This was a **daylight case.** The deceased was an experienced section foreman, riding on a track velocipede when overtaken by a train and killed. There was nothing

unusual about the train movement. The doctrine of last clear chance was not in the case; in fact, neither the engineer nor fireman was shown to have seen Nixon before the train struck him.

(3) Tuttle v. Milwaukee Ry., 122 U. S. 189, was decided in 1887, and, of course, was not under the Federal Act. This Court said (l. c. 194):

> "We do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question."

However, the Federal Act holds the railroad accountable for defects or insufficiencies in track or roadbed; and we are not sure but what the rule just announced has thus been abrogated.

Be that as it may, while the reason for the rule is quite apparent as to "curves," it can have no application to track spacing.

In the "construction of the tracks the engineer, of course, has to take into account the degree of curve with relation to the flange of the wheel; the sharper the curve the greater danger of the wheels of the equipment leaving the rails. The engineering problem then is to accurately combine three elements in their nearest possible propor-

tions, namely, degree of curve, economy of space and safety to employes and equipment.

Spacing of tracks requires nothing of the sort. The sole basis upon which rests their relativity is economy of space; the more the economy the greater the danger. Spacing of tracks is like the clearance of a waterspout, which Mr. Justice Day in Choctaw, O. etc. R. Co. v. McDade (191 U. S. 64, l. c. 67), said was "so free of any consideration of skill except that of the foot rule, and so entirely destitute of any element of choice or selection that not to make such a construction safe * * * is a conviction of negligence."

(4) Randall v. Baltimore & Ohio Ry. Co., 109 U. S. 478: In this case a brakeman was struck by a train while working a switch. It was decided in 1883, and so, of course, was not under the Federal statute. But as regards the switch, this Court said (l. c. 482) that it was

> "of a form in common use. * * * It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care, and it was unnecessary in order to work it to stand as the plaintiff did, at the end of the handle, next the adjacent track."

There was no showing that the enginemen saw plaintiff before he was struck, and, consequently, neither the question of warning nor last clear chance was in the case; nor does the choice of a place to work, as appears in the above case, apply to the case at bar.

(5) Connelley v. Pennsylvania R. Co., 201 Fed. 54. This was not under the federal act. Plaintiff, as administratrix, sued for death of husband, a trackwalker killed while engaged in tightening a bolt on rails of one of a network of tracks between two stations in the City of Philadelphia, over which "there is the constant passage of several hundred trains incident to such a station." He was working in a cloud of escaping steam and smoke from a standing engine alongside.

Trackwalkers, including deceased, were required to go in pairs "so that they can better look out for each other's safety," one supposed to watch while the other worked (l. c. 56). His companion called the attention of Connelley to the enveloping steam, and advised their moving aside (l. c. 57), and, as the Circuit Court of Appeals, in reversing the judgment below said (l. c. 57):

> "The failure of decedent to heed this timely warning and step aside undoubtedly cost him his life. The railroad had taken the additional step of placing a brakeman on the switching train. He was on watch and had the emergency brake ready, but the steam which enveloped Rowan and Connelley until they were struck, made it just as impossible for the brakeman to see them as it was for them to see the approaching train."

(6) Aerkfetz v. Humphreys, 145 U. S. 420, was decided in 1892, and so, of course, was not under the federal act,

which was intended to be remedial and to be liberally construed in favor of the employe. There was a directed verdict, but on the ground of contributory negligence (l. c. 419), not a defense under the federal act. Plaintiff was a track repairer. As the opinion recites (l. c. 420) that "for a quarter of a mile east of him there was no obstruction and by ordinary attention he could have observed the cars," we may assume that it was a daylight accident.

Petitioner apparently gains much comfort from the Aerkfetz case, supra; but even were there any similarity between the facts in that case and the instant case, the Aerkfetz case, as we read it, does not lay down a hard and fast rule for yard operations under all conditions.

The following cases distinguish the conditions therein contained:

T. & P. Ry. Co. v. Gentry, 163 U. S. 353 (l. c. 366), decided by this Court May 18, 1896, a yard movement at night, the negligence alleged and evidence adduced being almost identical to that in the instant case (l. c. 356).

Frazier v. Interstate R. R. Co., 264 Fed. 96, a yard movement at night (l. c. 97), in which the Aerkfetz case, supra, was mainly relied on by the defendant railroad to sustain a demurrer, and in which the Circuit Court of Appeals, Fourth Circuit, calls attention to the Aerkfetz case as a daylight accident (l. c. 97).

Central R. R. Co. of N. J. v. Sharkey, 259 Fed. 144 (l. c. 149), a yard movement (l. c. 145), and in which assumption of risk was held to be a jury question (l. c. 150).

(7) Reading Co. v. Haldeman, 20 F. (2d) 53 (C. C. A. 3rd), was not under the federal act. It was a daylight case. Plaintiff was walking between two tracks. The engine which struck him could be seen for 400 or 500 feet and plaintiff suddenly stepped right in front of it (l. c. 54). The last-clear-chance element was not present here.

(8) St. Louis etc. Ry. Co. v. Shumacher, 152 U. S. 77, was not under the federal act. Plaintiff, sitting on the end of a stationary flat car with his feet hanging over the side, was jolted off by the impact of cars which were coupled with unusual violence. He testified he knew they were about to couple cars, but was not watching and did not see the other cars come down. This Court held, in reversing the judgment of the Circuit Court (l. c. 81), that there was no negligence by defendant. The last-clear-chance element was not in the case.

(9) Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, as heretofore set out, is where a wharf owner recovered judgment for injuries caused by the negligent handling of a steamboat by the defendant. An instruction on last clear chance, which was given, was approved by this Court (l. c. 558) in affirming the judgment, nisi.

(10) Southern Pacific Co. v. Berkshire, 254 U. S. 415, involves the risk assumed by an engineer who, while lean-

ing from his cab, came in contact with a mail crane. That this Court did not extend the doctrine to include obstructions in general is evidenced by the language used (l. c. 416):

> "The Post Office Department fixes the distance of these cranes. The end of the crane, when elevated, was not nearer to the train than fourteen inches, but might have been found to be as near as that, and therefore near enough to be capable of hitting a person leaning out of the window, as indeed was shown by the event";

and continuing, at l. c. 418:

> "In short, it would be impossible to use the contrivance with absolute certainty that no accident would happen if a man put his head out at the wrong moment. It equally is impossible to condemn railroads as wrongdoers simply for adopting the device with the conditions imposed by the Post Office Department * * * but further, Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked, long before he reached it."

(Distinguished in Davis v. Crane, 12 Fed. (2d) 355, l. c. 359, in which the reviewing court says: "Defendant places stress upon Sou. Pac. v. Berkshire. * * * The doctrine in that case is limited by the Court to mail cranes. * * *")

(11) Seaboard Air Line v. Horton, 233 U. S. 492: Plaintiff was an experienced engineer and had reported the day before that his engine required a "guard glass" for the gauge on his engine, but he could not get a proper one and was instructed to run his engine without one. The glass exploded while he was operating the engine and fragments struck him in the face, and this was the basis of the suit. It was held (l. c. 501) that he assumed the risk.

(12) Jacobs v. Southern Ry. Co., 241 U. S. 229, holds that an experienced employe of a railroad, who knew of a pile of cinders, and who attempted to board a moving train with a bucket of water in his hand and claimed to have been tripped by the pile of cinders, assumed the risk. Assumption of risk, however, was for the jury.

The last three cases are cited by petitioner in support of its assignment VIII, that "an experienced railroad employe who is familiar with the custom of switching cars without providing them with a lookout or lights assumes the risk of injury resulting from such custom and is precluded from recovering for injuries suffered by reason thereof under the Federal Employers' Liability Act." Plainly they are not in point.

(13) Gilmer v. Yazoo & V. R. Co., 4 F. (2d) 963, was under the federal act. There was judgment for defendant railroad below, which was affirmed by the Court of Appeals, Fifth Circuit, which it reached on error. Certiorari to that court was denied here (268 U. S. 705).

However, there is no similarity between the facts in that case and the case at bar.

The Gilmer case was an action for death of flagman, due to negligence in switching cars in a railroad yard and in failing to properly light the yard (l. c. 963). Whether the failure to have a lookout or light on the car which struck Gilmer constituted negligence was not passed on by the Appellate Court, as witness the language of the opinion (l. c. 964):

> "In the view we take of the case it is unnecessary to consider either whether the switching operations conducted in defendant's yards were carried on in such a way as to constitute negligence on the part of the railroad company, or whether plaintiff's intestate was guilty of such negligence as to bar recovery. Assuming in favor of plaintiff that defendant was negligent, and that her husband was not, we are of opinion that the doctrine of assumption of risk is fatal to a recovery in this case."

But, as to assumption of risk, the facts are vastly different from the facts in the case at bar.

First and foremost, from the **uncontradicted testimony**, Gilmer, just before sunrise, when it was light enough to see a freight car at least 200 feet (l. c. 964), stopped immediately in the path of the car which was traveling about fifteen miles per hour. Freight trains were made up and broken in this yard continuously, about 2,000 cars being switched daily. Gilmer was not restricted in his

movements, or performing any work for the company which required him to look in a direction other than up and down the rails.

And, furthermore, the Court said (l. c. 964) that Gilmer was "bound to know from his experience that the precautions against injury now insisted upon did not prevail in defendant's yard, and that it might be expected at any time, day or night, that a car would be moved **without warning of any kind.**"

CONCLUSION.

The petitioner, to secure its writ herein, represented to this Court that the court below had permitted a jury to decide whether the tracks were negligently constructed as to the space between, a representation not warranted by the record. Petitioner also represented to this Court that the trial court announced a more liberal rule on the subject of last clear chance than the rule in the Federal courts permits. These two matters, as well as assumption of risk, were stressed as a basis for the issuance of the writ. Assumption of risk, petitioner claimed, was a question of law for the Court. The petition also represented that the facts in this case are similar to those in Aerkfetz v. Humphreys (supra); whereas, they are dissimilar in every respect, both as to physical conditions and basis of recovery.

We think this Court, as did the Missouri court, will hold that the instructions, so far as relating to track condi-

tions, were not intended and could not be understood as a basis for finding original negligence. We think, further, that the last-clear-chance instruction, if erroneous, was not prejudicial, in view of the actual evidence of knowledge.

On the main issue, assumption of risk, we do not believe this Court will ever hold that question one of law under such facts as exist here. It is doubtful if a writ would have been granted on that issue alone. In St. L. S. W. Ry. v. Martin, supra, more favorable to defendant than the instant case on assumption of risk, the writ was denied (266 U. S. 623, No. 579).

As to original negligence, respondent's position—which we believe to be invulnerable—is that it is one thing to see or know an employe is ahead on a track in broad daylight, then shunt a car in his direction in the belief that he will protect himself and is therefore in need of no warning, but that it is entirely different to do the same thing at night, when the employe ahead cannot see the start of the shunted car or see the car come forward. It is no justification under the latter conditions to say that he may be out of danger one moment and in danger the next. The railroad must govern its conduct by conditions as they are known to exist or might reasonably be expected to be encountered and by the usual way the employe exercising due care will react under those conditions. It is no excuse to claim that these requirements would place an undue burden upon railroad operation.

The instant case is essentially different from daytime cases, and essentially different from cases involving employes injured between causal or accidental openings between cars in yards. The exigencies of modern yard operations are not such that cars may be shunted at night without warning and with a total disregard for the safety of employes lawfully about the yards in the discharge of their duties and who, if required to be continually alert to safeguard life and limb, would be seriously hampered in the efficient performance of their duties.

To fasten assumption of risk upon respondent the negligent course of conduct by the railroad must be so constant, so usual and unvarying, and any other course of conduct so unusual, that respondent under all circumstances could have and should have expected unlighted cars in the darkness to move silently down and, unless he were continually on the watch for them, catch him unawares.

Negligence in a particular operation, to be assumed, must contemplate a then present knowledge and appreciation of danger.

That there was negligence in the operation here, we believe the record and the applicable law as announced by this Court has amply demonstrated. We do not believe that under the evidence here it can be seriously contended that respondent had, or could be charged with, knowledge or appreciation of the danger attendant thereon.

Finally, it is respectfully but insistently urged that, instead of **not** following the rulings of this Court, on the contrary, what the Missouri Supreme Court did do was to point out the peculiar facts in petitioner's cited cases and show clearly and convincingly why those peculiar facts rendered those cases inapplicable, and then proceed to patiently look up controlling cases by this Court in which the facts correspond as nearly as possible with the facts in the instant case. Those cases established a well-defined course, and that course the Missouri Supreme Court, "in spite of false lights on the shore," unerringly and unswervingly followed.

For reasons herein urged respondent believes that this Court ought not to assume jurisdiction; but if jurisdiction is assumed, an examination of the record and the opinion of the Missouri Supreme Court affirming the judgment below will clearly and conclusively show that such opinion is not only fully warranted by the law and facts, but is in perfect accord with applicable and controlling decisions of this Court, and should be affirmed.

Respectfully submitted,

HOLLAND R. POLAK,
JAMES J. O'DONOHOE,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 160.—October Term, 1927.

Toledo, St. Louis & Western Railroad Company, Petitioner, *vs.* Hilbert S. Allen. } On Writ of Certiorari to the Supreme Court of Missouri.

[February 20, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

October 27, 1922, petitioner's railway system was being operated by a receiver as a common carrier of interstate commerce. Respondent was a car checker in the service of the receiver; and, while employed in such commerce in petitioner's railroad yard at Madison, Illinois, he was struck and injured by a shunted car. He brought this action in the Circuit Court of Saint Louis, Missouri, claiming damages under the Employers Liability Act, U. S. C., Tit. 45, c. 2, § 51. The amended petition alleged that plaintiff's injuries were caused by the defendant's failure to maintain an adequate space between the tracks in the yard and by the negligent failure of other employees to warn him of the approach of the car. After the suit was commenced, the receiver was discharged and the railroad was returned to petitioner. The latter assumed the obligations of the receiver and was substituted for him as defendant. There was a verdict and judgment for plaintiff. The defendant, alleging numerous grounds, moved for a new trial. It was denied. The case was taken to the Supreme Court where the judgment was affirmed. — Mo. —. This Court granted a writ of certiorari. 273 U. S. 688.

The yard where plaintiff was injured included a lead track and, connected with it, a number of parallel switch tracks, the centers of which were about 12 feet apart. Plaintiff had been regularly employed there as car checker for about 18 months, and his hours were from eleven in the evening to seven in the morning. His work required him to be in the yard while switching was being

done and to go from place to place to check and list cars that had been switched and arranged on various tracks for the purpose of making up trains. At the time of the accident, he was checking a string of cars that had been placed on track 5 and was between it and track 4, about 125 yards from the lead. A switching crew was at work in the yard. The engine was on the lead attached to from 20 to 25 cars that were between it and switch 4. Two cinder cars were detached from the end while the string of cars was being pushed by the engine. They were shunted by means of the switch to track 4 and by their own momentum moved to the place where plaintiff was struck. The yard was not artificially lighted. It was an ordinary starlight night without moon. The shunted cars moved at moderate speed—four to six miles per hour—and made noise enough to be heard at a distance of one or two car lengths. They were unlighted and unattended and no person warned plaintiff of their approach.

The Act of Congress under which plaintiff seeks recovery took possession of the field of liability of carriers by railway for injuries sustained by their employees while engaged in interstate commerce, and superseded state laws upon that subject. *Second Employers' Liability Cases,* 223 U. S. 1, 55. This case is governed by that Act and the principles of the common law as applied in the courts of the United States. The plaintiff cannot recover in the absence of negligence on the part of defendant. *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 502. And, except as specified in § 4 of the Act, the employe assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees. *Boldt* v. *Pennsylvania R. R. Co.,* 245 U. S. 441, 445; *Ches. & Ohio Ry.* v. *Nixon,* 271 U. S. 218. If, upon an examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed. *C. M. & St. P. Ry. Co.* v. *Coogan,* 271 U. S. 472, 474.

The court authorized the jury to find defendant guilty of negligence if the space between the tracks was found to be so narrow that when track 5 was occupied plaintiff was in danger of being struck by cars moving on track 4. It was shown, as stated by the Supreme Court, that the clearance between the car that plaintiff was checking on track 5 and the moving cars on track 4

was about two feet and nine inches without considering the grab-irons on the cinder cars which projected four and one-half inches from each corner. While this space was sufficient to enable plaintiff to keep out of the way of the moving cars, the danger attending his work would have been lessened if the distance between the tracks had been greater. The work of checking cars in a yard at night where switching is being done is necessarily attended by much danger. But fault or negligence may not be inferred from the mere existence of danger or from the fact that plaintiff was struck and injured by the moving car. Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. *Missouri Pacific Railroad Co.* v. *Aeby,* 275 U. S. —. The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521, 529. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. *Tuttle* v. *Milwaukee Railway,* 122 U. S. 189, 194; *Randall* v. *Baltimore & Ohio R. R. Co.* 109 U. S. 478, 482; *Washington, &c. Railroad Co.* v. *McDade,* 135 U. S. 554, 570. Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks. *Missouri Pacific Railroad Co.* v. *Aeby, supra.* The court erred in submitting that question to the jury.

And the court authorized the jury to find defendant negligent in failing to cause the engine bell to be rung and in sending the cars along track 4 without a light and unattended. The opinion below declares that the starting or running of the switch engine without ringing a bell or blowing a whistle was evidence of negli-

gence; and that if, according to the practice, cars could be shunted dangerously near to the place where plaintiff was working, without any warning to him or "knowledge of such custom or practice on his part," the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and did not assume the risk. Obviously the ringing of the bell when and after the cinder cars were uncoupled or when the engine started or while it was running would not have been useful as a warning to plaintiff. When the cars were detached, he was from three to four hundred feet from the lead track and the engine was at the other end of the string of cars. The decision on this point is contrary to the rule followed in the Federal courts. *Aerkfetz* v. *Humphreys*, 145 U. S. 418, was a case presenting a situation similar to that here involved. It is there said (p. 420): "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion." And see *Rosney* v. *Erie R. Co.*, 135 Fed. 311, 315; *Connelley* v. *Pennsylvania R. Co.* 201 Fed. 54, 57. And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkfetz v. Humphreys, supra.*

In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him. *Boldt* v. *Pennsylvania R. R. Co., supra; Ches. & Ohio Ry.* v. *Nixon, supra; Randall* v. *Baltimore & Ohio R. R. Co., supra; Tuttle* v *Milwaukee Railway, supra.*

The amended petition alleged that the employees in charge of the engine and cars "saw, or by the exercise of ordinary care could have seen, plaintiff between said tracks, and in a position of peril and oblivious thereof in time thereafter, by the exercise of ordinary care, with the means and appliances at hand, to have either

held said cars stationary, or after having started said cars, stopped them, or slackened the speed thereof in time . . to have avoided striking and injuring plaintiff; but that said . . employes failed and neglected so to do." Defendant requested the court to charge that plaintiff was not entitled to recover on that ground. The court refused and submitted the question to the jury.

Defendant contends that the evidence is not sufficient to warrant a determination of that issue in favor of the plaintiff. Immediately prior to the switching movement in question, the engine working on the lead was headed westerly attached to the easterly end of the string. The crew consisted of a foreman, two switchmen—one in the field and the other following the engine—the engineer and fireman. The plaintiff was then at the place of the accident. There is no claim that he was not about his work in the usual way or that he could not have avoided the cars if he had known they were coming. A slight movement on his part would have been enough. When the engine pushed the string westerly along the lead to give the cinder cars momentum, the field man was on the south side of the lead and turned switch 4 to shunt them to that track. There is no evidence that he saw plaintiff or knew where he was while the switching movement was being made. The foreman of the crew was on the north side near the westerly end of the string of cars. He lifted the coupling pin to detach the cinder cars and gave signals for the starting and stopping of the engine in order to give them the desired impulse. He saw the lantern carried by plaintiff on the north side of the cars on track 5 and assumed that plaintiff was at work there. Plaintiff's son was the other switchman. He was on the north side near the middle of the string of cars and received from the foreman and transmitted to the engineer the signals for the starting and stopping of the engine. He also saw plaintiff's lantern. Neither engineer nor fireman knew where plaintiff was. The mere fact that the foreman and plaintiff's son saw the lantern and knew that plaintiff was checking cars on track 5 is not sufficient. There is nothing to sustain a finding that plaintiff was in any danger other than such as was usually incident to his employment or that any member of the crew knew or had any reason to believe that he was oblivious of the situation. *Illinois Central Railroad Co.* v. *Ackerman*, 144 Fed. 959, 962. In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were

not required to vary the switching practice customarily followed in that yard or to warn or to take other steps to protect him. There is no evidence to sustain the allegation that the other employees saw, or negligently failed to discover, plaintiff in a "position of peril and oblivious thereof". There was no foundation for a finding in favor of the plaintiff on that issue. Cf. *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 558-559; *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, 429; *Washington & Georgetown R'd* v. *Harmon*, 147 U. S. 571, 581-583; *Chunn* v. *City & Suburban Railway*, 207 U. S. 302, 309; *Denver City Tramway Co.* v. *Cook*, 164 Fed. 41, 43; *Kansas City Southern Ry. Co.* v. *Ellzey*, 275 U. S. —.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.